IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WAYNE L. COX,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 85-C-832-E
	)	
AT&T INFORMATION SYSTEMS, INC. a Delaware corporation, and SOUTHWESTERN BELL TELEPHONE COMPANY, an Oklahoma corporation,	)	
	)	
Defendants.	)	

ORDER OF DISMISSAL OF AT&T INFORMATION SYSTEMS, INC.

Now on this 31st day of ~~January~~ December, 1986, comes on before me, the undersigned United States District Judge, the Application of Plaintiff for the dismissal without prejudice of AT&T Information Systems, Inc., as a party Defendant herein. The Court, being fully advised in the premises, finds that said Application should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff's claim against Defendant AT&T Information Systems, Inc., be and same is hereby dismissed without prejudice.

S/ JAMES O. ELLISON

James O. Ellison
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAN GADDY ENTERPRISES, INC.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 86-C-399-E
	)	
PHARMASOL CORPORATION,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

On this 31st day of ~~January, 1987~~ December, 1986, upon the written application of the Plaintiff, Dan Gaddy Enterprises, Inc., for a Dismissal With Prejudice of the the Complaint and the Amended Complaint on file herein, the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and Amended Complaint and have requested the Court to dismiss said Complaint and Amended Complaint with prejudice to any further action. The Court, being fully advised in the premises, finds that the Complaint and Amended Complaint filed herein by the Plaintiff, Dan Gaddy Enterprises, Inc., shall be dismissed with prejudice to any further action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint, Amended Complaint and all causes of action of

the Plaintiff, Dan Gaddy Enterprises, Inc., be and the same hereby are dismissed with prejudice to any further action.

S/ JAMES O. ELLISON

JUDGE OF THE UNITED STATES
DISTRICT COURT

DAVID L. SOBEL, OBA #8444
2021 South Lewis, Suite 675
Tulsa, Oklahoma 74104
(918) 745-0607

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JED EDWIN GOLDBERG, Appellant, vs. FRED W. WOODSON, Trustee for Jed Edwin Goldberg, Appellee.	)	No. 86-C-347-E

ORDER

This matter is before the Court sua sponte on the question of whether there remains a controversy to be resolved between the parties. This matter is an appeal from an order entered by the United States Bankruptcy Judge for the Northern District of Oklahoma in the bankruptcy action filed by the Appellant, Jed Edwin Goldberg. On November 26, 1986 the United States Bankruptcy Judge for the Northern District of Oklahoma entered an order dismissing the underlying bankruptcy case upon motion of the debtor. The underlying bankruptcy having been dismissed, this Court concludes that there is no longer any controversy arising out of the bankruptcy for resolution by this Court.

IT IS THEREFORE ORDERED that this matter be dismissed with prejudice.

DATED this 31st day of December, 1986.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IVAN SAULMON — PLAINTIFF

VS. — No. 85-C-799-E

OKLAHOMA DEPARTMENT OF CORRECTIONS and DAVE MOORE, BARNEY LONG, CAROL WAYMAN, and MARTHA WARE, in their individual and official capacities — DEFENDANTS

ORDER

Upon motion of plaintiff, defendant Oklahoma Department of Corrections is dismissed as a party from the above styled case.

S/ JAMES O. ELLISON

U.S. DISTRICT JUDGE

Date: 12-31-86

606.2

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LIBERTY GLASS COMPANY, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant and Third-Party Plaintiff vs. TULSA-SAPULPA UNION RAILWAY company, a corporation, Third-Party Defendant.	)	No. 85-C-431-E

ORDER

Upon stipulation of the parties and for good cause shown, the third-party action is hereby dismissed with prejudice to the refiling of such action. All issues and actions in this case are now closed.

IT IS SO ORDERED this 31st day of December, 1986.

S/ JAMES O. ELLISON

United States District Judge

86-10046TN/113

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOYCE BRYANT,

Plaintiff,

v.

OTIS R. BOWEN, M.D, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 85-C-1129-E

ORDER

The Court has for consideration the Findings and Recommendations of the Magistrate filed December 4, 1986 in which the Magistrate recommended that the decision of the Secretary be affirmed. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed and adopted by the Court.

It is therefore Ordered that the decision of the Secretary denying plaintiff's application for disability insurance benefits under 42 U.S.C. §§416(i) and 423 be and is hereby affirmed.

Dated this 29th day of December, 1986.

for JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN L. MORSE and TERRY ALAN JENKINS,	)	
Plaintiffs,	)	
v.	)	No. 85-C-740-B
DEAN B. KNIGHT, an individual, FRED P. LEIDING, an individual, TOWN AND COUNTRY BANK, a banking institution, JACK G. STEELE, an individual,	)	
Defendants,	)	
and	)	
FIRST NATIONAL BANK OF SAPULPA,	)	
Intervenor.	)	

ORDER SUSTAINING MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS KNIGHT AND TOWN AND COUNTRY BANK AND OVERRULING SAME OF DEFENDANT LEIDING

Before the Court for decision are the motions for summary judgment pursuant to Fed.R.Civ.P. 56 of defendants Dean B. Knight ("Knight"), Fred P. Leiding ("Leiding") and Town and Country Bank ("Town and Country") relative to the claims of the plaintiff, Marvin L. Morse ("Morse")[1], for federal securities and RICO violations.

Pendent state claims of securities violations and actual and constructive fraud are also alleged by Morse. The claims of intervenor, First National Bank of Sapulpa against Knight,

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1 By Order of October 21, 1985, the plaintiff Terry Alan Jenkins ("Jenkins") was dismissed from this action due to his pending bankruptcy.

Leiding and Town and Country were dismissed by agreement of the parties in April, 1986.

As the Court's jurisdiction stems from the alleged federal securites and RICO violations, the matter is addressed specifically regarding these claims as to each movant. As is reflected from the following analysis, the Court concludes the motion for summary judgment of Town and Country Bank concerning Morse's securities and RICO claims is sustained. The motion for summary judgment of the defendant Leiding concerning Morse's securities and RICO claims is overruled and the motion for summary judgment of the defendant Knight concerning Morse's federal securities and RICO claim is sustained.

THE FACTS AND CLAIMS OF THE PARTIES:

In September 1981, Dean B. Knight ("Knight"), Fred P. Leiding ("Leiding"), and Jack G. Steele ("Steele") formed Tejas Foods, a partnership. The principal assets of the partnership were 2 restaurants in Midland and Austin, Texas operating under the name of Montana Mining Company. In early 1982, the partnership, Tejas Foods, transferred its assets to Tejas Foods, Inc., an Oklahoma corporation ("Tejas"), owned in equal shares by Knight, Leiding and Steele. No stock certificates in Tejas were ever issued or delivered to Knight, Leiding and Steele. Steele had the responsibility for the actual operation of the Tejas restaurants in Texas.

Sometime in 1983, Knight, Leiding and Steele sold their Tejas stock to Longhorn Foods, Inc. ("Longhorn"), an Oklahoma

corporation. The written sales agreement is dated January 1, 1983. Longhorn was owned principally by Steele and operated a restaurant in Tulsa, Oklahoma under the name of Montana Mining Company. Knight and Leiding owned no interest in Longhorn. The basic consideration given by Longhorn for the purchase of the Tejas stock was the assumption and indemnity by Longhorn of approximately $212,500.00 debt of Tejas to the Bank of Oklahoma, upon which Knight, Leiding and Steele were personally obligated, and to arrange to have substitute guarantors for Knight and Leiding on Tejas' debt to Miguel's, Inc. (Agreement attached to Knight Affidavit filed December 6, 1985).

There is dispute over why plaintiffs Morse and Jenkins became involved in refinancing the Bank of Oklahoma obligations at the First National Bank and Security National Bank of Sapulpa, Oklahoma ($100,000 loans at each bank), and in being substituted for Knight and Leiding on a $400,000.00 obligation of Tejas to Miguel's, Inc. (Exhibit B to Leiding's summary judgment brief as to Morse).

Leiding is and was at relevant times herein president and a director of the Town and Country Bank, Tulsa, Oklahoma. Morse, Jenkins and Knight were also directors of the Town and Country Bank during relevant times herein. Leiding and Morse as directors and/or members of the loan and discount committee of the Town and Country Bank knew that the Board of Directors and the loan and discount committee had to approve all significant loans, particularly loans to directors or director-owned or

controlled entities.[2] All directors knew of such required approval.

Morse's basic explanation of his involvement in the restaurants of Tejas is found in his answer to Interrogatory No. 1:

> "Leiding enticed Morse to buy his interest in Tejas Foods, Inc., for consideration of becoming liable person [sic] on company liabilities, knowing that Tejas Foods was in financial difficulty. Leiding also represented to Morse that he and Dean Knight would take care of any and all financing and capital requirements of this operation through Town & Country Bank, and upon financial restructuring through Town & County Bank would repurchase the ownership, and that Morse would have no exposure or involvement therein...."

Morse asserts that his involvement in early 1983 was as a temporary accommodation to Leiding and Knight. Knight wanted out of Tejas due to his ill health and Morse states Leiding represented that he spoke for Knight also. Leiding, as a nonowner, was to restructure the financing of the Tejas restaurants through Town and Country Bank over a period of months and then Morse and Jenkins were to be replaced by Leiding. Leiding would then reward Morse and Jenkins for their accommodation by making a minority interest in the refinanced entity available to them. Morse and Jenkins were motivated to accommodate Leiding by their past friendship, and by the fact that Leiding was president of Town and Country Bank, which was significant concerning existing business relationships and borrowing Morse and Jenkins had with the bank.

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2 Such was required of state banks insured by the FDIC. 12 U.S.C. §375b; 12 U.S.C. §1828; 6 Okl.St.Ann. §404; 6 Okl. St.Ann. §1404.

Leiding contends Morse's involvement in Tejas was through his work as an accountant for Tejas and his knowledge of the business and association with Steele. Leiding states that he sold no stock in Tejas to Morse and Jenkins because he had already sold his stock to Longhorn, Inc., on January 1, 1983. The parties agree purchase of stock was not mentioned but Morse and Jenkins assert that acquiring Leiding's and Knight's "interest" was discussed with Leiding.

Morse states that after obtaining his consent to replace Leiding and Knight as obligors on Tejas promissory notes, Leiding refinanced the Bank of Oklahoma $200,000.00 obligation through $100,000.00 loans from First National Bank and Security National Bank in Sapulpa, Oklahoma. Morse, Jenkins and Steele were principal obligors on the Sapulpa banks notes.

The president of First National Bank of Sapulpa states that Leiding and other representatives of Town and Country Bank assured him the First National Bank loan of $100,000.00 was only for a short period of time and would be brought back into the Town and Country Bank within about 90 days.

Refinancing was not accomplished by Leiding through Town and Country Bank, or any other source, and when the obligations became due the Texas restaurant operation was doing poorly and Morse, Jenkins and Steele were unable to repay them.

Morse commenced this action alleging federal securities fraud and RICO violations by Leiding, Knight, Steele and Town and Country Bank, as well as state pendent claims. Town and Country

is contended to be an aider and abettor in the federal securities violations and a party to the RICO violations. First National of Sapulpa, as intervenor, asserts a RICO claim against Knight, Leiding and Town and Country Bank, as well as common law fraud claims.

The various motions for summary judgment will be discussed in the following order: Town and Country Bank as to the claims of Morse, Knight as to the claims of Morse, Leiding as to the claims of Morse, and the claims of First National Bank of Sapulpa against Knight, Leiding and the Town and Country Bank.

STANDARD OF SUMMARY JUDGMENT

Summary judgment may be granted only where the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Courts should approach the disposition of Rule 56 motions with caution. Madison v. Deseret Livestock Co., 574 F.2d 1027, 1037 (10th Cir. 1978). The "*** ultimate purpose of summary judgment is to pierce the allegations of the pleadings to show that there are no genuine issues of material fact. If there is an absence of material issues, then the movant is entitled to judgment as a matter of law." Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39, 41 (10th Cir. 1973); Ando v. Great Western Sugar Company, 475 F.2d 531, 535 (10th Cir. 1973).

Summary judgment is appropriate where there are no triable issues and a trial on the merits would therefore be fruitless.

Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1360-1 (10th Cir. 1977); Frey v. Frankel, 361 F.2d 437, 442 (10th Cir. 1962); Traverse v. World Service Life Ins. Co., 436 F.Supp. 810, 811 (W.D.Okla. 1977). Summary judgment is inappropriate, notwithstanding the existence of uncontroverted facts, where the reasonable inferences to be drawn from those facts are in dispute. Londrigan v. Federal Bureau of Investigation, 670 F.2d 1164, 1171 n. 37 (D.C.Cir. 1981); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980); Williams v. Borden, Inc., 637 F.2d 731, 734 (10th Cir. 1980); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, 36 (10th Cir. 1975); Webb v. Allstate Life Ins. Co., 536 F.2d 336, 339 (10th Cir. 1976).

Recent United States Supreme Court cases discussing the application of Fed.R.Civ.P. 56 are Celotex Corporation v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. _____, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

MORSE'S SECURITIES AND RICO CLAIMS AGAINST TOWN AND COUNTRY BANK

The evidence before the Court is clear that Town and Country Bank owned no interest in Tejas, and this fact was known to Morse. Therefore, Town and Country Bank cannot be considered a seller of securities. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), and Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952).

Morse contends Leiding was acting as agent for Town and Country Bank. (Interrogatory 15 and Morse Deposition Testimony). Morse also states Leiding was speaking on his own behalf concerning Tejas. (Interrogatory 16 - Morse Deposition Testimony). Morse, a CPA, and as a director of the Town and Country Bank and member of the Audit Committee, occasionally attending meetings of the Loan and Discount Committee, knew that bank president Leiding was without authority to by himself authorize the prospective loan alleged herein. (Morse deposition testimony 1-3-86 at pp. 81-82, Morse deposition testimony 1-9-86, p. 29).[3]

Under general rules of agency the principal is liable for the acts of an agent on behalf of the principal if the agent's acts are within the scope of actual or apparent authority. Actual authority requires the mutual consent of both principal and agent. The consent may be in the form of an agreement between the parties or may be implied from the conduct of the parties. Aldis v. Brown, 412 F.Supp. 1066, 1071 (W.D.Okla. 1975). Consent of both parties to an agency relationship is an essential element of its creation. No such consent on the part of Town and Country Bank is present herein and this fact was known to Morse. Morse contends that some benefit was to accrue to the Town and Country Bank in the purported refinancing of Tejas and that it in some manner would assist Town and Country Bank in relieving it of problems with bank regulators in Town and Country Bank's dealings

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[3] See footnote 2.

with Tejas. Other than Morse's allegations in this regard there is no support in the record any benefit would accrue to Town and Country Bank from the transaction. Celotex Corporation v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In order to establish apparent authority in the absence of consent, a third party must show reliance upon some manifestation made by the principal. It is not enough to show that the alleged agent held himself out as representing the interests of the principal. D.W.L., Inc., v. Goodner-Van Engineering Company, 373 P.2d 38, 42 (Okl. 1962). It is incumbent upon a person dealing with an alleged agent to discover at his peril whether such pretended agent had authority, and that such authority is, in its nature, sufficient to permit him to do the proposed act. Master Commodities, Inc. v. Texas Cattle Management, et al., 586 F.2d 1352, 1359 (9th Cir. 1978), quoting McDonald v. Strawn, 78 Okla. 271, 190 P. 558, 561 (1920).

The evidence herein supports the conclusion that Leiding had neither actual nor apparent authority to represent Town and Country Bank in the purported Tejas Foods refinancing transaction. This was in part because all parties knew any such subsequent loan by Town and Country Bank required approval of the Loan and Discount Committee as well as the Board of Directors. The evidence establishes that no such formal loan request was submitted to Town and Country. Leiding alone, although president of Town and Country Bank, could not obligate the bank in this regard.

To support his federal securities violation aiding and abetting claim against the Town and Country Bank, Morse alleges the bank "materially aided and materially participated, through its agent Leiding, in the scheme to sell to plaintiffs securities and to further defraud and disadvantage them." The evidence is undisputed that the bank owned no interest in Tejas and could not make a loan to Tejas or to Morse, Jenkins and Steele for the purposes of restructuring Tejas' indebtedness without Loan and Discount Committee and Board of Directors approval of a loan in the $400,000 range.

As is pointed out in Woods v. Homes & Structures of Pittsburg, Kansas, 489 F.Supp. 1270, 1278 (D.Kan. 1980), the elements of aiding and abetting in a Rule 10b-5 violation are: (1) proof of securities law violations; (2) proof that the alleged aider-abettor knew of the violations and its role in the scheme; and (3) proof that the alleged aider-abettor knowingly and substantially assisted in the violation. Woodward v. Metro Bank of Dallas, 522 F.2d 84 (5th Cir. 1975), and Seiffer v. Topsy's International, Inc., 487 F.Supp. 653 (D.Kan. 1980).

Morse states in his affidavit (January 8, 1986) that he agreed to the purchase of Leiding's "interest" in Tejas on a temporary basis because of his friendship and trust in Leiding, his large unsecured loans at the Town and Country Bank which he felt were threatened if he refused Leiding, and further because of Leiding's promise of a minority share of the business once it was restructured by Leiding through Town and Country Bank and

Leiding had retaken his ownership position. For the reasons previously expressed, Morse knew Leiding had no authority to act on behalf of the Town and Country Bank and was acting for his own interests. Therefore, no issue of fact remains that permits the inference that Town and Country Bank knew of violations of the securities laws and knowingly and substantially assisted in the violation.

The plaintiff Morse's sixth claim for relief centers in alleged violation by Town and Country Bank of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§1961-68. Any person injured in his business or property by reason of a violation of 18 U.S.C. §1962 may maintain an action in the federal court and recover treble damages, costs, and attorneys fees from the violator. 18 U.S.C. §1964. The evidence herein, as previous analysis has demonstrated, establishes that Leiding was acting for himself and not as agent for Town and Country Bank. Therefore, if Leiding's conduct could be characterized as racketeering under the Act, it was him alone and not the Town and Country Bank. Therefore, the motion for summary judgment of the defendant Town and Country Bank regarding Morse's federal securities and RICO claims is sustained.

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT DEAN B. KNIGHT

In 1982 Knight advised Leiding he desired to sell his interest in Tejas due to ill health. (Leiding Affidavit). Leiding contacted Steele, and Steele stated that he would purchase Leiding's and Knight's interest through Longhorn, Inc.

(Leiding Affidavit). The contract with Longhorn was entered into for this purpose.

Steele stated, "Due to Knight's health and Leiding's improved ability to assist in refinancing Tejas without a conflict of interest, I was informed by Mr. Leiding that he and Knight wanted out of the company and off all guarantor obligations. In connection with the above stated objective of relieving Leiding and Knight of their obligations as guarantors for Tejas Foods, I was requested, by Mr. Fred Leiding, during the first half of 1983 to do those things necessary to accomplish the substitutions of the guarantees of Knight and Leiding with those of Morse and Jenkins." (Steele Affidavit, May 19, 1986). Steele continued, "It was contemplated that after replacing Leiding and Knight on their obligations as guarantors for Tejas Foods, that Longhorn Foods would acquire Tejas Foods. Longhorn did buy all of the stock of Tejas in the summer of 1983. This contract was signed in the summer of 1983, even though dated January 1, 1983. It was planned that the operation of Tejas and Longhorn would be consolidated in some fashion and that Mr. Morse and Mr. Jenkins would be compensated for replacing Leiding and Knight as guarantors for Tejas Foods, Inc. by being sold or given, in return for their accommodation in this connection, an interest in the combined restaurant operation." (Steele Affidavit, May 19, 1986).

Morse stated in his affidavit of January 8, 1986, that Leiding solicited him to take over Leiding's interest and replace

him as personal guarantor on certain indebtedness in Tejas. Leiding stated to Morse that he and Knight needed to remove themselves from Tejas in order to financially restructure that company; Morse agreed to this transaction and proceeded to replace Leiding and all his interest in Tejas Foods beginning with certain guarantees on corporate indebtedness on July 13, 1983. Leiding informed Morse that Jenkins would take the position of Knight in Tejas. Leiding further informed Morse that Morse's interest in Tejas would only be temporary and that Leiding would hold him harmless from any lawsuits and that after the restructuring of Tejas finances, Leiding would come back into the company and would compensate Morse for his having accommodated Leiding by permitting him to have an interest in the company. (Morse Affidavit, January 8, 1986, paragraphs 3 and 4, pages 1 and 2). Morse states in his affidavit that he "agreed to this purchase on a temporary basis because of [his] friendship and trust of Leiding, [his] large unsecured loans at the Town and Country Bank which [he] felt were threatened if [he] refused Leiding ... and the promise of a minority share of the business once it was restructured by Leiding through Town and Country Bank and Leiding had retaken his ownership position ..." (Morse Affidavit, January 8, 1986, paragraph 7, page 3).

As consideration for the sale of Knight's Tejas stock, Longhorn, in which Knight owned no interest, agreed to become principally liable on certain obligations of Knight and Leiding to the Bank of Oklahoma and to hold Knight and Leiding harmless

from such obligations. Steele also agreed on behalf of Longhorn to use his best efforts to obtain the release of Knight from a contingent liability to Miguel's, Inc. ("Miguel's") stemming from Knight's personal guarantee of the debts of Tejas to Miguel's. (Affidavit of Dean B. Knight, paragraph 7 and Exhibit A attached).

At no time did Knight negotiate directly or indirectly with Morse or Jenkins either for their purchase of his stock in Tejas or for the substitution of their personal guarantees for the guarantees of Knight and Leiding in Miguel's. (Affidavit of Dean B. Knight, paragraphs 9-14; Deposition of Marvin Morse at 107; Deposition of Terry Jenkins at 35).

Knight has no knowledge independent from demands made by plaintiffs' counsel prior to filing this suit and the pleadings and allegations made in this case, of any negotiations between either Leiding or Steele and either Morse or Jenkins for the purchase of Tejas stock. (Affidavit of Dean B. Knight, paragraphs 9-10).

Knight has no knowledge, independent from demands made by plaintiffs' counsel prior to filing this suit and the pleadings and allegations made in this case, of any negotiations between either Leiding or Steele and either Morse or Jenkins for the substitution of the personal guarantees of Morse and Jenkins for the guarantees of Knight and Leiding to Miguel's for the indebtedness of Tejas. (Affidavit of Dean B. Knight, paragraphs 9 and 11).

Knight neither spoke to nor communicated with either Morse or Jenkins concerning any of the alleged wrongful conduct complained of in this case at any time prior to the year 1985 when Morse contacted Knight to inform him that this action would be filed. (Affidavit of Dean B. Knight, paragraph 12; Deposition of Marvin Morse at 107, 115; Deposition of Terry Jenkins at 35, 39).

Knight never authorized Leiding or Steele to deal with third parties on his behalf in connection with the disposition of his stock in Tejas. (Affidavit of Dean B. Knight, paragraph 13).

Knight never represented to Morse or Jenkins that Leiding or Steele were authorized to act on his behalf in any matter relating to Tejas. (Affidavit of Dean B. Knight, paragraph 14; Deposition of Marvin Morse at 107; Deposition of Terry Jenkins at 36).

Leiding never represented to Morse or Jenkins that he was authorized to act on Knight's behalf. (Deposition of Marvin Morse at 111; Deposition of Terry Jenkins at 36).

None of the false statements or misrepresentations alleged in plaintiffs' complaint were made by Knight. (Deposition of Marvin Morse at 106-16; Deposition of Terry Jenkins at 40-49).

In exchange for Knight's stock, sold to Longhorn in which Steele was the principal shareholder, Steele on behalf of Longhorn agreed to become principally liable replacing Knight on the Bank of Oklahoma obligation and to use his best efforts to get Knight released from Tejas' obligation to Miguel's.

(Affidavit of Knight, paragraph 7 and Exhibit "A"). From such evidence the more probable conclusion is that Steele was acting on behalf of Longhorn and himself, and not as agent for Knight in obtaining Knight's release from such obligations.

Morse argues that by retention of the benefits, Knight, as principal, has ratified the wrongful conduct of Leiding, his agent. Retention of benefits will constitute ratification only if Knight had full knowledge of the unauthorized acts of Leiding and/or Steele on his behalf. (It should be remembered that Morse in his affidavit states that Morse was temporarily acquiring the "interest" of Leiding and Jenkins the interest of Knight who was selling out.) The undisputed evidence establishes that Knight first learned of the Morse-Jenkins allegations of wrongful conduct by Leiding on Knight's behalf shortly before this litigation was commenced in 1985.[4] (Affidavit Dean B. Knight, paragraph 12; Deposition of Morse, October 17, 1985, pp. 115-116).

Consent of both parties to an agency relationship is an essential element. Such consent may be in the form of an agreement between the parties or may be implied from the conduct of the parties. Aldis v. Brown, 412 F.Supp. 1066, 1071 (W.D.Okla. 1975). Knight did not authorize either Leiding or

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4 "One who is sought to be held as principal upon the theory of ratification by retention of benefits after the acquisition of knowledge of an unauthorized act by an agent will not be deemed to have ratified the act if the position of the alleged principal has so changed that it would be inequitable to require a return of the benefits under the changed conditions." Clemson v. Century Petroleum Co., 64 P.2d 1219 (Okla. 1937).

Steele to deal with third parties on his behalf in connection with the disposition of his Tejas stock. (Affidavit of Dean B. Knight, paragraph 13).

Even without consent, a "principal" may become liable for the acts of an "agent" if the principal has led a third party to believe that an agency relationship exists. In order to establish apparent authority in the absence of consent, a third party must show reliance upon some manifestation made by the principal. It is not enough to show that the alleged agent held himself out as representing the interests of the principal. D.W.L., Inc. v. Goodner-Van Engineering Co., 373 P.2d 38, 42 (Okl. 1962). Herein, neither Morse nor Jenkins claims to have relied upon manifestations by Knight and each admit never having discussed the transaction with Knight prior to its consummation. (Deposition of Marvin Morse at 107-15; Deposition of Terry Jenkins at 35-35).

It is incumbent upon a person dealing with an alleged agent to discover at his peril whether such pretended agent had authority, and that such authority is, in its nature, sufficient to permit him to do the proposed act. McDonald v. Strawn, 78 Okl. 271, 190 P. 558, 561 (1920), and Master Commodities, Inc. v. Texas Cattle Management, et al., 586 F.2d 1352 (9th Cir. 1978) quoting McDonald v. Strawn at 1359. Neither Morse nor Jenkins made any efforts to contact Knight when the transactions complained of were allegedly taking place.

Estoppel will also bind a person who fails to deny the existence of an agency, if that person has knowledge of any misrepresentations or misunderstandings as to the true relationship between the parties. Master Commodities, Inc., 586 F.2d at 1358. The record reflects Knight had no knowledge of the relevant transactions which Steele and Leiding are alleged to have negotiated with Morse and Jenkins so Knight had no obligation to deny the existence of the agency. The essential basis of Morse's belief that Knight defrauded him is that Knight benefited from the transaction. (Deposition of Marvin Morse at 110-11; Deposition of Jim Treat at 84-86).

As pointed out in Aldis v. Brown, 412 F.Supp. 1066 (W.D.Okla. 1975) (citing 2A C.J.S. Agency, §71), "The essential elements of a ratification are (1) acceptance by the principal of the benefits of the agent's acts, (2) with full knowledge of the facts, and (3) circumstances or affirmative election indicating an intention to adopt the unauthorized arrangement."

In the instant case, no evidence exists which suggests that Knight knew or should have known at the time of his stock sale of any representations made by a co-defendant which the plaintiffs allege to be fraudulent. Restatement (Second) of Agency §91; Stone v. First Wyoming Bank, N.A., 625 F.2d 332 (10th Cir. 1980). Acceptance of benefits, standing alone, is not enough to satisfy the essential elements of a ratification under Oklahoma law. It is established by Knight's affidavit and the lack of contradictory evidence, that Knight had no knowledge of the

wrongful conduct of Leiding alleged by plaintiff and neither Morse nor Jenkins had a factual basis for believing that Leiding or Steele were authorized to act on Knight's behalf in making the alleged fraudulent representations. Celotex Corporation v. Catrett, 477 U.S. ____, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986).

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT LEIDING AS TO CLAIMS OF THE PLAINTIFF MORSE

As has been previously stated, Morse has testified that he was "temporarily" acquiring Leiding's interest in Tejas as an "accommodation" to permit Leiding to refinance obligations of Tejas and then Leiding resume his Tejas interest.[5] If Morse actually acquired Leiding's interest in Tejas, such could be considered purchase of a security under the federal securities laws. Securities Exchange Commission v. W. J. Howey & Co., 328 U.S. 293 (1946); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975); and Birnbaum v. Newport Steel Corporation, 193 F.2d 461 (2nd Cir. 1952), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952). Thus, a factual question remains in this regard, and in regard to the alleged attendent fraud of Leiding previously discussed.

Next to be considered is Morse's claim that Leiding engaged in a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-68. The alleged predicate acts of Leiding are:

5 Leiding argues that purchase of a "stock" interest in Tejas was not discussed by Morse or Jenkins. It is of some relevance that no stock certificates had ever been issued to Leiding, Knight and Steele by Tejas when it was originally incorporated.

a) Multiple uses of United States Mail and other means or instruments of interstate communication and commerce for delivery, directly or indirectly, to Plaintiffs for the purposes of the offer and sale of securities, of information and other communications containing untrue statements of material facts and omissions to state material facts and contravention of Section 17(a) of the Securities Act of 1933, 15 U.S.C., Section 77Q(a), punishable under Section 24 of said Act, 15 U.S.C. Section 77x; and

b) Repeated uses of the United Sates Mail or other means of instrumentalities of interstate communication and commerce to use or employ with the sale of the securities complained of herein deceptive devices or contrivances, as more fully described in Paragrpahs set forth above, in contravention of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C., Section 78j(b), and Rule 10b-5, 17 C.F.R., Section 240.10b-5 promulgated under the Securities Exchange Commission Exchange Act 1934 Section 78ff(a);

c) Committed acts indictable under 18 U.S.C., Section 1343, in that they unlawfully, willfully and knowingly used wire and telephonic communications and interstate commerce to execute schemes and artifices devised or intended to defraud the Plaintiffs and to obtain money and property from him by means of false and fraudulent pretenses, representatives and promises;

d) The acts under 18 U.S.C., Section 1341, in that they unlawfully, willfully and knowingly placed into the mail, to be sent or delivered by the postal service materials used in the execution of schemes and artifices devised or intended to defraud the Plaintiffs and to obtain money and property from them by means of false and fraudulent pretenses, representations and promises.

Since Sedima, S.P.R.L. v. Imrex Co., 473 U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346, 358-359 (1985), a dominant issue in such pending civil RICO actions is whether plaintiff had pled and proven that defendant's conduct constitutes a "pattern of racketeering activity." In the now-famous footnote number 14 (104 S.Ct. at 3285, 87 L.Ed.2d at 358), the Supreme Court in Sedima established that proof of a pattern of racketeering

activity requires proof of a continuous number of predicate acts, all of which are related:

> "As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in §1961 in that it states that a pattern 'requires at least two acts of racketeering activity.' §1961(5) (emphasis added), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.' ... '[t]he term 'pattern' itself requires the showing of a relationship ... So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern' ... Significantly, in defining 'pattern' in a later provision of the same bill, Congress was more enlightening: 'criminal conduct forms a pattern if it embraces acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' This language may be useful in interpreting other sections of the Act." [Emphasis in original.]

While Sedima's footnote 14 is dictum, courts have given great deference to it and have attempted to analyze what is and what is not "continuity-plus-relationship." One group of cases has held that continuity-plus-relationship requires a series of related acts and more than one scheme or episode to defraud. Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986); Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F.Supp. 828 (N.D.Ill. 1985); Medallion TV Enterprises, Inc. v. SelecTV of California, Inc., 627 F.Supp. 1290 (C.D.Cal. 1986); Fleet

Management Systems, Inc. d/b/a Logistic Systems v. Archer-Daniels-Midland Company, Inc. and Nims Associates, Inc., 627 F.Supp. 550 (C.D.Ill. 1986); Morgan v. Bank of Waukegan, 615 F.Supp. 836 (N.D.Ill. 1985); and Professional Asset Management, Inc. v. Penn Square Bank, N.A., 607 F.Supp. 1290 (W.D.Okl. 1985).

A second line of cases interprets the concept of continuity-plus-relationship more expansively and holds that a series of continuous acts undertaken in connection with a single scheme or episode to defraud constitutes a pattern. Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985); Trak Microcomputer Corp. v. Wearne Brothers, 628 F.Supp. 1089 (N.D.Ill. 1985); Conan Properties, Inc. v. Mattel, Inc., 619 F.Supp. 1167, 1170 (S.D.N.Y. 1985); and Systems Research, Inc. v. Random, Inc., 614 F.Supp. 494, 497 (N.D.Ill. 1985).

The pattern of racketeering activity analysis, post-Sedima, cries out for a consistent vocabulary. The terms "single criminal scheme," "episode," or "transaction" are not always helpful in the continuity-plus relationship analysis. This is because some single scheme, episode, or transactions may have numerous predicate acts that would not qualify as a pattern of racketeering activity, while other predicate acts would qualify.

The most helpful recent case discussing the continuity-plus-relationship analysis of pattern of racketeering activity is Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986). Morgan

involved acts of alleged mail fraud in an initial loan transaction and two foreclosure sales, ongoing over a period of four years. Morgan concludes that a RICO cause of action was alleged principally because the mailing predicate acts involved distinct injuries over the extended period. Morgan has a good discussion of the terms "continuity" and "relationship" stating at page 975:

> "Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the terms 'continuity' and 'relationship' are somewhat at odds with one another. Relationship implies that the predicate acts were comitted somewhat closely in time to one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity or relationship alone effectively negates the remaining prong. See Heritage Insurance, 629 F.Supp. at 1416. We acknowledge that subsequent to the Supreme Court's opinion in Sedima, the mere commission of two or more predicate acts within ten years of one another does not automatically constitute a pattern of racketering activity. To the degree that, prior to Sedima, we said that two predicate acts invariably constitute a pattern of racketeering activity, e.g., United States v. Witherspoon, 581 F.2d 595, 602 (7th Cir. 1978), such statements are no longer valid. The acts must demonstrate both a continuity and a relationship in order to constitute a pattern of racketeering activity. However, the proposition that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule. Otherwise defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts, an untenable result.

> Instead, we agree with those courts that have steered a middle course between these two extremes. In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., "transactions 'somewhat separated in time and place.'" Graham v. Slaughter, 624 F.Supp. 222, 225 (N.D.Ill. 1985) (quoting United States v. Moeller, 402 F.Supp. 49, 57-58 (D.Conn. 1975); see McLendon v. The Continental Group, Civ. A. No. 83-1340 (D.N.J. July 31, 1986) (adopting middle approach); Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co., 639 F.Supp. 1532 (D.Mass. 1986) (adopting the same approach). ..."

Then Morgan suggests:

> ". . . Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. ..." (Emphasis supplied).

The court continued:

> "However, the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement. The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative." Morgan at 975-76.

The Morgan court then explains that in the situation where a defendant defrauds a plaintiff by falsifying a loan application, even though two predicate act mailings may be involved, a pattern would be lacking, because it is a single transaction occurring at a single point in time. Ghouth v. Conticommodity Services, Inc., 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). There would be but a

single distinct or discreet injury, that of the loan transaction, although numerous mailings may be involved.

The Morgan court then pointed to the Seventh Circuit case of Lipin Enterprises Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986), wherein the court concluded the plaintiff failed to allege a pattern of racketeering activity where fraud was claimed in the acquisition of $960,000.00 worth of stock. Although there were numerous predicate acts, in Lipin, the court at pages 976-77 of the Morgan opinion stated:

> ". . . The mere fact that the complexity of the transaction generates numerous pieces of paper and hence a greater number of possible fraudulent acts does not make these predicate acts ongoing over a period of time so as to constitute separate transactions that are distinct in time and place. Since these predicate acts were all made in a fairly short period of time (several months), and all clearly relate to the same transaction (the acquisition of a large block of stock), involve a single scheme and a single victim, and create a single injury, the acts in Lipin do not satisfy the continuity aspect of the pattern of racketeering activity."

The Morgan court concludes by stating that in adopting the factually oriented standard, as opposed to a hard and fast set rule, the legal test is necessarily less than precise.

When the Court applies the Morgan pattern of racketeering activity factors to the alleged acts of Leiding in the instant matter, the pattern analysis is difficult and equivocal.

The dealings with Morse, Jenkins, First National of Sapulpa, Security National of Sapulpa, and Miguel's could involve various alleged predicate acts and victims in the overall alleged fraudulent scheme to remove Leiding from the Tejas loan

guarantees. The entire alleged scheme took place over a period of approximately six to nine months in 1983. If the allegations of fraud are true, distinct injuries occurred to each victim at the time of the guaranty or loan substitution.

Both the legislative history (S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969))[6] and Sedima, 105 S.Ct. at 3285 n. 14 (1985), state that the threat of continuing activity is an element to consider relative to pattern. This implicates the question herein of whether there is a threat that Leiding would use his bank president position for related fraudulent personal gain in the future.

The allegations and evidence herein establish relationship in the predicate acts but the question remains of whether there is the element of continuity (including the threat of continued activity) sufficient to establish a pattern of racketeering activity. However, the doubt at this point will be resolved in plaintiff Morse's favor and the motion for summary judgment of Leiding is overruled regarding the RICO claim.

In conclusion, for the reasons stated herein, Morse's action against defendants Knight and Town and Country Bank is dismissed

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6 "The concept of 'pattern' is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of Title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."

and the action will proceed on the claims of plaintiff Morse against the defendant Leiding and Steele.

The following pretrial schedule is provided:

1) Exchange the names and addresses of all witnesses, including experts (stating briefly the gist of the witness' testimony unless the witness' deposition has been taken) by February 16, 1987;

2) Discovery cut off is March 13, 1987;

3) Final pretrial conference is set for April 1, 1987, at 2:30 P.M.

4) Final pretrial order (exchange and premark all exhibits) by April 6, 1987;

5) Requested voir dire, requested instructions, motions in limine, and any trial brief a party wishes to file by April 9, 1987 (reference to previously filed briefs is permissible);

6) Jury trial is set for April 20, 1987.

IT IS SO ORDERED this 30th day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANET LEE MILLER, individually, and as next friend of MEGAN MILLER, a minor child,	)	
Plaintiff,	)	
vs.	)	No. 85-C-593-E
VICTOR SCOTT BALDRIDGE, ROBERT D. REYNOLDS d/b/a BOB REYNOLDS OPTICAL, and BOB REYNOLDS OPTICAL,	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon joint application of the parties and being duly informed herein, the Court finds that plaintiffs' claim against the defendants herein should be and the same as hereby dismissed with prejudice.

S/ THOMAS R. BRETT

for S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

PATRICK M. RYAN
Attorney for Plaintiffs

WILLIAM S. HALL
Attorney for Defendant
Victor Scott Baldridge

RICHARD CARPENTER
Attorney for Defendant
Robert D. Reynolds d/b/a
Bob Reynolds Optical and
Bob Reynolds Optical

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 30 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

JIM McKINLEY,

Plaintiff,

vs.

WILLIAM R. TATHAM, SR., an individual; WILLIAM R. TATHAM, JR., individually and d/b/a the OKLAHOMA OUTLAWS; and the OKLAHOMA OUTLAWS, a franchise of the United States Football League,

Defendants.

Case No. 84-C-822-E

DISMISSAL WITH PREJUDICE

COMES NOW the plaintiff herein by and through his counsel of record, this matter having been settled, and dismisses this case and all causes of action herein with prejudice to refiling.

Respectfully submitted,

COUNSEL FOR PLAINTIFF:

By: George Hooper
GEORGE HOOPER
KENNETH D. BODENHAMER
ROBERT O. BROOKS
5310 East 31st Street, Suite 600
Tulsa, OK 74135-5014
(918) 664-0800

CERTIFICATE OF MAILING

I CERTIFY that on the 30th day of December 1986, I mailed a true and correct copy of the foregoing document to counsel for defendants, to-wit:

Robert H. Scribner
1391 West Shaw Avenue
P. O. Box 9572
Fresno, CA 93793

C. Clay Roberts, III
MARSH & ARMSTRONG
100 West 5th Street, Suite 808
Tulsa, OK 74103

George Hooper

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOUSTON INTERNATIONAL TELEVIDEO, INC. and VIDEO EAST, LTD.,	§	
Plaintiffs,	§	Case No. 86-C-823-B
vs.	§	
TECHNICOLOR, INC., THE VIDTRONICS COMPANY, INC., and VIDEO COMMUNICATIONS, INC.,	§	
Defendants.	§	

ORDER OF DISMISSAL WITH PREJUDICE

NOW before the Court is the Joint Application for Order of Dismissal With Prejudice submitted by Plaintiffs, Houston International Televideo, Inc. and Video East, Ltd., and Defendants, Technicolor, Inc., The Vidtronics Company, Inc. and Video Communications, Inc.

IT IS HEREBY ORDERED:

(1) Plaintiffs' causes of action against Defendants Technicolor, Inc., The Vidtronics Company, Inc. and Video Communications, Inc. are dismissed with prejudice; and

(2) The counterclaims of the Defendants Technicolor, Inc., The Vidtronics Company, Inc. and Video Communications, Inc. against the Plaintiffs are dismissed with prejudice.

(3) All costs shall be borne by the party incurring same.

ORDERED this 29th day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BOARD OF TRUSTEES OF THE PIPELINE INDUSTRY BENEFIT FUND, Plaintiff,	)	
v.	)	No. 86-C-599-E
W. L. GOLIGHTLY, INC., a Texas corporation, Defendant.	)	

ORDER

For good cause shown, and upon the Application of the Plaintiff, the Court finds that this case should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case is dismissed with prejudice.

S/ THOMAS R. BRETT

JAMES O. ELLISON
JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN L. MORSE and TERRY ALAN JENKINS,	)	
Plaintiffs,	)	
v.	)	No. 85-C-740-B
DEAN B. KNIGHT, an individual, FRED P. LEIDING, an individual, TOWN AND COUNTRY BANK, a banking institution, JACK G. STEELE, an individual,	)	
Defendants,	)	
and	)	
FIRST NATIONAL BANK OF SAPULPA,	)	
Intervenor.	)	

O R D E R

Before the Court for decision are the motions for summary judgment pursuant to Fed.R.Civ.P. 56 of defendants Dean B. Knight ("Knight"), Fred P. Leiding ("Leiding") and Town and Country Bank relative to the claims of the plaintiff, Marvin L. Morse ("Morse")[1], for federal securities and RICO violations and also the motion for summary judgment of the same defendants concerning the claims of the intervenor, First National Bank of Sapulpa, Oklahoma for alleged RICO violations.

Pendent state claims of securities violations and actual and constructive fraud are also alleged by Morse and for common law fraud by intervenor, First National Bank of Sapulpa, Oklahoma.

[1] By Order of October 21, 1985, the plaintiff Terry Alan Jenkins ("Jenkins") was dismissed from this action due to his pending bankruptcy.

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As the Court's jurisdiction stems from the alleged federal securites and RICO violations, the matter is addressed specifically regarding these claims as to each movant. As is reflected from the following analysis, the Court concludes the motion for summary judgment of Town and Country Bank concerning Morse's securities and RICO claims is sustained. The motion for summary judgment of the defendant Leiding concerning Morse's securities and RICO claims is overruled and the motion for summary judgment of the defendant Knight concerning Morse's federal securities and RICO claim is sustained.

The motion for summary judgment of defendant Town and Country Bank regarding the intervenor First National Bank of Sapulpa's RICO claim is sustained; the motion for summary judgment of the defendant Leiding concerning the RICO claim of the First National Bank of Sapulpa is overruled, and the same motion for summary judgment of the defendant Knight in that regard is sustained.

THE FACTS AND CLAIMS OF THE PARTIES:

In September 1981, Dean B. Knight ("Knight"), Fred P. Leiding ("Leiding"), and Jack G. Steele ("Steele") formed Tejas Foods, a partnership. The principal assets of the partnership were 2 restaurants in Midland and Austin, Texas operating under the name of Montana Mining Company. In early 1982, the partnership, Tejas Foods, transferred its assets to Tejas Foods, Inc., an Oklahoma corporation ("Tejas"), owned in equal shares by Knight, Leiding and Steele. No stock certificates in Tejas were

ever issued or delivered to Knight, Leiding and Steele. Steele had the responsibility for the actual operation of the Tejas restaurants in Texas.

Sometime in 1983, Knight, Leiding and Steele sold their Tejas stock to Longhorn Foods, Inc. ("Longhorn"), an Oklahoma corporation. (The written sales agreement is dated January 1, 1983, but there is evidence that it was not consummated and signed until the summer of 1983. Steele Affidavit, May 18, 1986). Longhorn was owned principally by Steele and operated a restaurant in Tulsa, Oklahoma under the name of Montana Mining Company. Knight and Leiding owned no interest in Longhorn. The basic consideration given by Longhorn for the purchase of the Tejas stock was the assumption and indemnity by Longhorn of approximately $212,500.00 debt of Tejas to the Bank of Oklahoma, upon which Knight, Leiding and Steele were personally obligated, and to arrange to have substitute guarantors for Knight and Leiding on Tejas' debt to Miguel's, Inc. (Agreement attached to Knight Affidavit filed December 6, 1985).

There is dispute over why plaintiffs Morse and Jenkins became involved in refinancing the Bank of Oklahoma obligations at the First National Bank and Security National Bank of Sapulpa, Oklahoma ($100,000 loans at each bank), and in being substituted for Knight and Leiding on a $400,000.00 obligation of Tejas to Miguel's, Inc. (Exhibit B to Leiding's summary judgment brief as to Morse).

Leiding is and was at relevant times herein president and a director of the Town and Country Bank, Tulsa, Oklahoma. Morse, Jenkins and Knight were also directors of the Town and Country Bank during relevant times herein. Leiding and Morse as directors and/or members of the loan and discount committee of the Town and Country Bank knew that the Board of Directors and the loan and discount committee had to approve all significant loans, particularly loans to directors or director-owned or controlled entities.[2] All directors knew of such required approval.

Morse's basic explanation of his involvement in the restaurants of Tejas is found in his answer to Interrogatory No. 1:

> "Leiding enticed Morse to buy his interest in Tejas Foods, Inc., for consideration of becoming liable person [sic] on company liabilities, knowing that Tejas Foods was in financial difficulty. Leiding also represented to Morse that he and Dean Knight would take care of any and all financing and capital requirements of this operation through Town & Country Bank, and upon financial restructuring through Town & County Bank would repurchase the ownership, and that Morse would have no exposure or involvement therein...."

Morse asserts that his involvement in early 1983 was as a temporary accommodation to Leiding and Knight. Knight wanted out of Tejas due to his ill health and Morse states Leiding represented that he spoke for Knight also. Leiding, as a nonowner, was to restructure the financing of the Tejas

[2] Such was required of state banks insured by the FDIC. 12 U.S.C. §375b; 12 U.S.C. §1828; 6 Okl.St.Ann. §404; 6 Okl. St.Ann. §1404.

restaurants through Town and Country Bank over a period of months and then Morse and Jenkins were to be replaced by Leiding. (Steele Affidavit May 18, 1986, adopting deposition in Central Market v. Steele, No. 84-C-97-B, Northern District of Oklahoma). Leiding would then reward Morse and Jenkins for their accommodation by making a minority interest in the refinanced entity available to them. Morse and Jenkins were motivated to accommodate Leiding by their past friendship, and by the fact that Leiding was president of Town and Country Bank, which was significant concerning existing business relationships and borrowing Morse and Jenkins had with the bank.

Leiding contends Morse's involvement in Tejas was through his work as an accountant for Tejas and his knowledge of the business and association with Steele. Leiding states that he sold no stock in Tejas to Morse and Jenkins because he had already sold his stock to Longhorn, Inc., on January 1, 1983. The parties agree purchase of stock was not mentioned but Morse and Jenkins assert that acquiring Leiding's and Knight's "interest" was discussed with Leiding.

Morse states that after obtaining his consent to replace Leiding and Knight as obligors on Tejas promissory notes, Leiding refinanced the Bank of Oklahoma $200,000.00 obligation through $100,000.00 loans from First National Bank and Security National Bank in Sapulpa, Oklahoma. Morse, Jenkins and Steele were principal obligors on the Sapulpa banks notes.

The president of First National Bank of Sapulpa states that Leiding and other representatives of Town and Country Bank assured him the First National Bank loan of $100,000.00 was only for a short period of time and would be brought back into the Town and Country Bank within about 90 days.

Refinancing was not accomplished by Leiding through Town and Country Bank, or any other source, and when the obligations became due the Texas restaurant operation was doing poorly and Morse, Jenkins and Steele were unable to repay them.

Morse commenced this action alleging federal securities fraud and RICO violations by Leiding, Knight, Steele and Town and Country Bank, as well as state pendent claims. Town and Country is contended to be an aider and abettor in the federal securities violations and a party to the RICO violations. First National of Sapulpa, as intervenor, asserts a RICO claim against Knight, Leiding and Town and Country Bank, as well as common law fraud claims.

The various motions for summary judgment will be discussed in the following order: Town and Country Bank as to the claims of Morse, Knight as to the claims of Morse, Leiding as to the claims of Morse, and the claims of First National Bank of Sapulpa against Knight, Leiding and the Town and Country Bank.

STANDARD OF SUMMARY JUDGMENT

Summary judgment may be granted only where the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." Fed.R.Civ.P. 56(c). Courts should approach the disposition of Rule 56 motions with caution. Madison v. Deseret Livestock Co., 574 F.2d 1027, 1037 (10th Cir. 1978). The "*** ultimate purpose of summary judgment is to pierce the allegations of the pleadings to show that there are no genuine issues of material fact. If there is an absence of material issues, then the movant is entitled to judgment as a matter of law." Commercial Iron & Metal Co. v. Bache & Co., Inc., 478 F.2d 39, 41 (10th Cir. 1973); Ando v. Great Western Sugar Co., 475 F.2d 531, 535 (10th Cir. 1973).

Summary judgment is appropriate where there are no triable issues and a trial on the merits would therefore be fruitless. Webbe v. McGhie Land Title Company, 549 F.2d 1358, 1360-1 (10th Cir. 1977); Frey v. Frankel, 361 F.2d 437, 442 (10th Cir. 1962); Traverse v. World Service Life Insurance Co., 436 F.Supp. 810, 811 (W.D.Okla. 1977). Summary judgment is inappropriate, notwithstanding the existence of uncontroverted facts, where the reasonable inferences to be drawn from those facts are in dispute. Londrigan v. F.B.I., 216 U.S.App.D.C. 345, 670 F.2d 1164, 1171 n. 37 (1981); Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980); Williams v. Bordeen, 637 F.2d 731, 734 (10th Cir. 1980); Mustang Fuel Corporation v. Youngstown Sheet & Tube, 516 F.2d 33, 36 (10th Cir. 1975); Webb v. Allstate Life Insurance Co., 536 F.2d 336, 339 (10th Cir. 1976).

Recent United States Supreme Court cases discussing the application of Fed.R.Civ.P. 56 are Celotex Corporation v.

Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. _____, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

MORSE'S SECURITIES AND RICO CLAIMS AGAINST TOWN AND COUNTRY BANK

The evidence before the Court is clear that Town and Country Bank owned no interest in Tejas, and this fact was known to Morse. Therefore, Town and Country Bank cannot be considered a seller of securities. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), and Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952).

Morse contends Leiding was acting as agent for Town and Country Bank. (Interrogatory 15 and Morse Deposition Testimony). Morse also states Leiding was speaking on his own behalf concerning Tejas. (Interrogatory 16 - Morse Deposition Testimony). Morse, a CPA, and as a director of the Town and Country Bank and member of the Audit Committee, occasionally attending meetings of the Loan and Discount Committee, knew that bank president Leiding was without authority to by himself authorize the prospective loan alleged herein. (Morse deposition testimony 1-3-86 at pp. 81-82, Morse deposition testimony 1-9-86, p. 29).[3]

Under general rules of agency the principal is liable for the acts of an agent on behalf of the principal if the agent's acts are within the scope of actual or apparent authority. Actual

[3] See footnote 2.

authority requires the mutual consent of both principal and agent. The consent may be in the form of an agreement between the parties or may be implied from the conduct of the parties. Aldis v. Brown, 412 F.Supp. 1066, 1071 (W.D.Okla. 1975). Consent of both parties to an agency relationship is an essential element of its creation. No such consent on the part of Town and Country Bank is present herein and this fact was known to Morse. Morse contends that some benefit was to accrue to the Town and Country Bank in the purported refinancing of Tejas and that it in some manner would assist Town and Country Bank in relieving it of problems with bank regulators in Town and Country Bank's dealings with Tejas. Other than Morse's allegations in this regard there is no support in the record any benefit would accrue to Town and Country Bank from the transaction. Celotex Corporation v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In order to establish apparent authority in the absence of consent, a third party must show reliance upon some manifestation made by the principal. It is not enough to show that the alleged agent held himself out as representing the interests of the principal. D.W.L., Inc., v. Goodner-Van Engineering Company, 373 P.2d 38, 42 (Okl. 1962). It is incumbent upon a person dealing with an alleged agent to discover at his peril whether such pretended agent had authority, and that such authority is, in its nature, sufficient to permit him to do the proposed act. Master Commodities, Inc. v. Texas Cattle Management, et al., 586 F.2d 1352, 1359 (9th Cir. 1978), quoting McDonald v. Strawn, 78 Okla. 271, 190 P. 558, 561 (1920).

The evidence herein supports the conclusion that Leiding had neither actual nor apparent authority to represent Town and Country Bank in the purported Tejas Foods refinancing transaction. This was in part because all parties knew any such subsequent loan by Town and Country Bank required approval of the Loan and Discount Committee as well as the Board of Directors. The evidence establishes that no such formal loan request was submitted to Town and Country. Leiding alone, although president of Town and Country Bank, could not obligate the bank in this regard.

To support his federal securities violation aiding and abetting claim against the Town and Country Bank, Morse alleges the bank "materially aided and materially participated, through its agent Leiding, in the scheme to sell to plaintiffs securities and to further defraud and disadvantage them." The evidence is undisputed that the bank owned no interest in Tejas and could not make a loan to Tejas or to Morse, Jenkins and Steele for the purposes of restructuring Tejas' indebtedness without Loan and Discount Committee and Board of Directors approval of a loan in the $400,000 range.

As is pointed out in Woods v. Homes & Structures of Pittsburg, Kansas, 489 F.Supp. 1270, 1278 (D.Kan. 1980), the elements of aiding and abetting in a Rule 10b-5 violation are: (1) proof of securities law violations; (2) proof that the alleged aider-abettor knew of the violations and its role in the scheme; and (3) proof that the alleged aider-abettor knowingly

and substantially assisted in the violation. Woodward v. Metro Bank of Dallas, 522 F.2d 84 (5th Cir. 1975), and Seiffer v. Topsy's International, Inc., 487 F.Supp. 653 (D.Kan. 1980).

Morse states in his affidavit (January 8, 1986) that he agreed to the purchase of Leiding's "interest" in Tejas on a temporary basis because of his friendship and trust in Leiding, his large unsecured loans at the Town and Country Bank which he felt were threatened if he refused Leiding, and further because of Leiding's promise of a minority share of the business once it was restructured by Leiding through Town and Country Bank and Leiding had retaken his ownership position. For the reasons previously expressed, Morse knew Leiding had no authority to act on behalf of the Town and Country Bank and was acting for his own interests. Therefore, no issue of fact remains that permits the inference that Town and Country Bank knew of violations of the securities laws and knowingly and substantially assisted in the violation.

The plaintiff Morse's sixth claim for relief centers in alleged violation by Town and Country Bank of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§1961-68. Any person injured in his business or property by reason of a violation of 18 U.S.C. §1962 may maintain an action in the federal court and recover treble damages, costs, and attorneys fees from the violator. 18 U.S.C. §1964. The evidence herein, as previous analysis has demonstrated, establishes that Leiding was acting for himself and not as agent for Town and

Country Bank. Therefore, if Leiding's conduct could be characterized as racketeering under the Act, it was him alone and not the Town and Country Bank. Therefore, the motion for summary judgment of the defendant Town and Country Bank regarding Morse's federal securities and RICO claims is sustained.

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT DEAN B. KNIGHT

In 1982 Knight advised Leiding he desired to sell his interest in Tejas due to ill health. (Leiding Affidavit). Leiding contacted Steele, and Steele stated that he would purchase Leiding's and Knight's interest through Longhorn, Inc. (Leiding Affidavit). The contract with Longhorn was entered into for this purpose.

Steele stated, "Due to Knight's health and Leiding's improved ability to assist in refinancing Tejas without a conflict of interest, I was informed by Mr. Leiding that he and Knight wanted out of the company and off all guarantor obligations. In connection with the above stated objective of relieving Leiding and Knight of their obligations as guarantors for Tejas Foods, I was requested, by Mr. Fred Leiding, during the first half of 1983 to do those things necessary to accomplish the substitutions of the guarantees of Knight and Leiding with those of Morse and Jenkins." (Steele Affidavit, May 19, 1986). Steele continued, "It was contemplated that after replacing Leiding and Knight on their obligations as guarantors for Tejas Foods, that Longhorn Foods would acquire Tejas Foods. Longhorn did buy all of the stock of Tejas in the summer of 1983. This

contract was signed in the summer of 1983, even though dated January 1, 1983. It was planned that the operation of Tejas and Longhorn would be consolidated in some fashion and that Mr. Morse and Mr. Jenkins would be compensated for replacing Leiding and Knight as guarantors for Tejas Foods, Inc. by being sold or given, in return for their accommodation in this connection, an interest in the combined restaurant operation." (Steele Affidavit, May 19, 1986).

Morse stated in his affidavit of January 8, 1986, that Leiding solicited him to take over Leiding's interest and replace him as personal guarantor on certain indebtedness in Tejas. Leiding stated to Morse that he and Knight needed to remove themselves from Tejas in order to financially restructure that company; Morse agreed to this transaction and proceeded to replace Leiding and all his interest in Tejas Foods beginning with certain guarantees on corporate indebtedness on July 13, 1983. Leiding informed Morse that Jenkins would take the position of Knight in Tejas. Leiding further informed Morse that Morse's interest in Tejas would only be temporary and that Leiding would hold him harmless from any lawsuits and that after the restructuring of Tejas finances, Leiding would come back into the company and would compensate Morse for his having accommodated Leiding by permitting him to have an interest in the company. (Morse Affidavit, January 8, 1986, paragraphs 3 and 4, pages 1 and 2). Morse states in his affidavit that he "agreed to this purchase on a temporary basis because of [his] friendship

and trust of Leiding, [his] large unsecured loans at the Town and Country Bank which [he] felt were threatened if [he] refused Leiding ... and the promise of a minority share of the business once it was restructured by Leiding through Town and Country Bank and Leiding had retaken his ownership position ..." (Morse Affidavit, January 8, 1986, paragraph 7, page 3).

As consideration for the sale of Knight's Tejas stock, Longhorn, in which Knight owned no interest, agreed to become principally liable on certain obligations of Knight and Leiding to the Bank of Oklahoma and to hold Knight and Leiding harmless from such obligations. Steele also agreed on behalf of Longhorn to use his best efforts to obtain the release of Knight from a contingent liability to Miguel's, Inc. ("Miguel's") stemming from Knight's personal guarantee of the debts of Tejas to Miguel's. (Affidavit of Dean B. Knight, paragraph 7 and Exhibit A attached).

At no time did Knight negotiate directly or indirectly with Morse or Jenkins either for their purchase of his stock in Tejas or for the substitution of their personal guarantees for the guarantees of Knight and Leiding in Miguel's. (Affidavit of Dean B. Knight, paragraphs 9-14; Deposition of Marvin Morse at 107; Deposition of Terry Jenkins at 35).

Knight has no knowledge independent from demands made by plaintiffs' counsel prior to filing this suit and the pleadings and allegations made in this case, of any negotiations between either Leiding or Steele and either Morse or Jenkins for the

purchase of Tejas stock. (Affidavit of Dean B. Knight, paragraphs 9-10).

Knight has no knowledge, independent from demands made by plaintiffs' counsel prior to filing this suit and the pleadings and allegations made in this case, of any negotiations between either Leiding or Steele and either Morse or Jenkins for the substitution of the personal guarantees of Morse and Jenkins for the guarantees of Knight and Leiding to Miguel's for the indebtedness of Tejas. (Affidavit of Dean B. Knight, paragraphs 9 and 11).

Knight neither spoke to nor communicated with either Morse or Jenkins concerning any of the alleged wrongful conduct complained of in this case at any time prior to the year 1985 when Morse contacted Knight to inform him that this action would be filed. (Affidavit of Dean B. Knight, paragraph 12; Deposition of Marvin Morse at 107, 115; Deposition of Terry Jenkins at 35, 39).

Knight never authorized Leiding or Steele to deal with third parties on his behalf in connection with the disposition of his stock in Tejas. (Affidavit of Dean B. Knight, paragraph 13).

Knight never represented to Morse or Jenkins that Leiding or Steele were authorized to act on his behalf in any matter relating to Tejas. (Affidavit of Dean B. Knight, paragraph 14; Deposition of Marvin Morse at 107; Deposition of Terry Jenkins at 36).

Leiding never represented to Morse or Jenkins that he was authorized to act on Knight's behalf. (Deposition of Marvin Morse at 111; Deposition of Terry Jenkins at 36).

None of the false statements or misrepresentations alleged in plaintiffs' complaint were made by Knight. (Deposition of Marvin Morse at 106-06; Deposition of Terry Jenkins at 40-49).

In exchange for Knight's stock, sold to Longhorn in which Steele was the principal shareholder, Steele on behalf of Longhorn agreed to become principally liable replacing Knight on the Bank of Oklahoma obligation and to use his best efforts to get Knight released from Tejas' obligation to Miguel's. (Affidavit of Knight, paragraph 7 and Exhibit "A"). From such evidence the more probable conclusion is that Steele was acting on behalf of Longhorn and himself, and not as agent for Knight in obtaining Knight's release from such obligations.

Morse argues that by retention of the benefits, Knight, as principal, has ratified the wrongful conduct of Leiding, his agent. Retention of benefits will constitute ratification only if Knight had full knowledge of the unauthorized acts of Leiding and/or Steele on his behalf. (It should be remembered that Morse in his affidavit states that Morse was temporarily acquiring the "interest" of Leiding and Jenkins the interest of Knight who was selling out.) The undisputed evidence establishes that Knight first learned of the Morse-Jenkins allegations of wrongful conduct by Leiding on Knight's behalf shortly before this

litigation was commenced in 1985.[4] (Affidavit Dean B. Knight, paragraph 12; Deposition of Morse, October 17, 1985, pp. 115-116).

Consent of both parties to an agency relationship is an essential element. Such consent may be in the form of an agreement between the parties or may be implied from the conduct of the parties. Aldis v. Brown, 412 F.Supp. 1066, 1071 (W.D.Okla. 1975). Knight did not authorize either Leiding or Steele to deal with third parties on his behalf in connection with the disposition of his Tejas stock. (Affidavit of Dean B. Knight, paragraph 13).

Even without consent, a "principal" may become liable for the acts of an "agent" if the principal has led a third party to believe that an agency relationship exists. In order to establish apparent authority in the absence of consent, a third party must show reliance upon some manifestation made by the principal. It is not enough to show that the alleged agent held himself out as representing the interests of the principal. D.W.L., Inc. v. Goodner-Van Engineering Co., 373 P.2d 38, 42 (Okl. 1962). Herein, neither Morse nor Jenkins claims to have relied upon manifestations by Knight and each admit never having discussed the transaction with Knight prior to its consummation.

4 "One who is sought to be held as principal upon the theory of ratification by retention of benefits after the acquisition of knowledge of an unauthorized act by an agent will not be deemed to have ratified the act if the position of the alleged principal has so changed that it would be inequitable to require a return of the benefits under the changed conditions." Clemson v. Century Petroleum Co., 64 P.2d 1219 (Okla. 1937).

(Deposition of Marvin Morse at 107-15; Deposition of Terry Jenkins at 35-35).

It is incumbent upon a person dealing with an alleged agent to discover at his peril whether such pretended agent had authority, and that such authority is, in its nature, sufficient to permit him to do the proposed act. McDonald v. Strawn, 78 Okl. 271, 190 P. 558, 561 (1920), and Master Commodities, Inc. v. Texas Cattle Management, et al., 586 F.2d 1352 (9th Cir. 1978) quoting McDonald v. Strawn at 1359. Neither Morse nor Jenkins made any efforts to contact Knight when the transactions complained of were allegedly taking place.

Estoppel will also bind a person who fails to deny the existence of an agency, if that person has knowledge of any misrepresentations or misunderstandings as to the true relationship between the parties. Master Commodities, Inc., 586 F.2d at 1358. The record reflects Knight had no knowledge of the relevant transactions which Steele and Leiding are alleged to have negotiated with Morse and Jenkins so Knight had no obligation to deny the existence of the agency. The essential basis of Morse's belief that Knight defrauded him is that Knight benefited from the transaction. (Deposition of Marvin Morse at 110-11; Deposition of Jim Treat at 84-86).

As pointed out in Aldis v. Brown, 412 F.Supp. 1066 (W.D.Okla. 1975) (citing 2A C.J.S. Agency, §71), "The essential elements of a ratification are (1) acceptance by the principal of the benefits of the agent's acts, (2) with full knowledge of the

facts, and (3) circumstances or affirmative election indicating an intention to adopt the unauthorized arrangement."

In the instant case, no evidence exists which suggests that Knight knew or should have known at the time of his stock sale of any representations made by a co-defendant which the plaintiffs allege to be fraudulent. Restatement (Second) of Agency §91; Stone v. First Wyoming Bank, N.A., 625 F.2d 332 (10th Cir. 1980). Acceptance of benefits, standing alone, is not enough to satisfy the essential elements of a ratification under Oklahoma law. It is established by Knight's affidavit and the lack of contradictory evidence, that Knight had no knowledge of the wrongful conduct of Leiding alleged by plaintiff and neither Morse nor Jenkins had a factual basis for believing that Leiding or Steele were authorized to act on Knight's behalf in making the alleged fraudulent representations. Celotex Corporation v. Catrett, 477 U.S. ____, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986).

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT LEIDING AS TO CLAIMS OF THE PLAINTIFF MORSE

As has been previously stated, Morse has testified that he was "temporarily" acquiring Leiding's interest in Tejas as an "accommodation" to permit Leiding to refinance obligations of Tejas and then Leiding resume his Tejas interest.[5] If Morse actually acquired Leiding's interest in Tejas, such could be

5 Leiding argues that purchase of a "stock" interest in Tejas was not discussed by Morse or Jenkins. It is of some relevance that no stock certificates had ever been issued to Leiding, Knight and Steele by Tejas when it was originally incorporated.

considered purchase of a security under the federal securities laws. Securities Exchange Commission v. W. J. Howey & Co., 328 U.S. 293 (1946); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975); and Birnbaum v. Newport Steel Corporation, 193 F.2d 461 (2nd Cir. 1952), cert. denied, 343 U.S. 956, 72 S.Ct. 1051, 96 L.Ed. 1356 (1952). Thus, a factual question remains in this regard, and in regard to the alleged attendent fraud of Leiding previously discussed.

Next to be considered is Morse's claim that Leiding engaged in a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-68. The alleged predicate acts of Leiding are:

> a) Multiple uses of United States Mail and other means or instruments of interstate communication and commerce for delivery, directly or indirectly, to Plaintiffs for the purposes of the offer and sale of securities, of information and other communications containing untrue statements of material facts and omissions to state material facts and contravention of Section 17(a) of the Securities Act of 1933, 15 U.S.C., Section 77Q(a), punishable under Section 24 of said Act, 15 U.S.C. Section 77x; and
>
> b) Repeated uses of the United Sates Mail or other means of instrumentalities of interstate communication and commerce to use or employ with the sale of the securities complained of herein deceptive devices or contrivances, as more fully described in Paragrpahs set forth above, in contravention of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C., Section 78j(b), and Rule 10b-5, 17 C.F.R., Section 240.10b-5 promulgated under the Securities Exchange Commission Exchange Act 1934 Section 78ff(a);
>
> c) Committed acts indictable under 18 U.S.C., Section 1343, in that they unlawfully, willfully and knowingly used wire and telephonic communications and interstate commerce to execute schemes and artifices devised or intended to defraud the Plaintiffs and to obtain money and property from him by means of false and fraudulent pretenses, representatives and promises;

d) The acts under 18 U.S.C., Section 1341, in that they unlawfully, willfully and knowingly placed into the mail, to be sent or delivered by the postal service materials used in the execution of schemes and artifices devised or intended to defraud the Plaintiffs and to obtain money and property from them by means of false and fraudulent pretenses, representations and promises.

Since Sedima, S.P.R.L. v. Imrex Co., 473 U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346, 358-359 (1985), a dominant issue in such pending civil RICO actions is whether plaintiff had pled and proven that defendant's conduct constitutes a "pattern of racketeering activity." In the now-famous footnote number 14 (104 S.Ct. at 3285, 87 L.Ed.2d at 358), the Supreme Court in Sedima established that proof of a pattern of racketeering activity requires proof of a continuous number of predicate acts, all of which are related:

> "As many commentators have pointed out, the definition of a 'pattern of racketeering activity' differs from the other provisions in §1961 in that it states that a pattern 'requires at least two acts of racketeering activity.' §1961(5) (emphasis added), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern.' The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.' ... '[t]he term 'pattern' itself requires the showing of a relationship ... So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern' ... Significantly, in defining 'pattern' in a later provision of the same bill, Congress was more enlightening: 'criminal conduct forms a pattern if it embraces acts that have the same or similar purposes, results, participants,

> victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' This language may be useful in interpreting other sections of the Act." [Emphasis in original.]

While Sedima's footnote 14 is dictum, courts have given great deference to it and have attempted to analyze what is and what is not "continuity-plus-relationship." One group of cases has held that continuity-plus-relationship requires a series of related acts and more than one scheme or episode to defraud. Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986); Northern Trust Bank/O'Hara, N.A. v. Inryco, Inc., 615 F.Supp. 828 (N.D.Ill. 1985); Medallion TV Enterprises, Inc. v. Select TV of California, Inc., 627 F.Supp. 1290 (C.D.Cal. 1986); Fleet Management Systems, Inc. d/b/a Logistic Systems v. Archer-Daniels-Midland Company, Inc. and Nims Associates, Inc., 627 F.Supp. 550 (C.D.Ill. 1986); Morgan v. Bank of Waukegan, 615 F.Supp. 836 (N.D.Ill. 1985); and Professional Asset Management, Inc. v. Penn Square Bank, N.A., 607 F.Supp. 1290 (W.D.Okl. 1985).

A second line of cases interprets the concept of continuity-plus-relationship more expansively and holds that a series of continuous acts undertaken in connection with a single scheme or episode to defraud constitutes a pattern. Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985); Trak Microcomputer Corp. v. Wearne Brothers, 628 F.Supp. 1089 (N.D.Ill. 1985); Conan Properties, Inc. v. Mattel, Inc., 619 F.Supp. 1167, 1170

(S.D.N.Y. 1985); and Systems Research, Inc. v. Random, Inc., 614 F.Supp. 494, 497 (N.D.Ill. 1985).

The pattern of racketeering activity analysis, post-Sedima, cries out for a consistent vocabulary. The terms "single criminal scheme," "episode," or "transaction" are not always helpful in the continuity-plus relationship analysis. This is because some single scheme, episode, or transactions may have numerous predicate acts that would not qualify as a pattern of racketeering activity, while other predicate acts would qualify.

The most helpful recent case discussing the continuity-plus-relationship analysis of pattern of racketeering activity is Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986). Morgan involved acts of alleged mail fraud in an initial loan transaction and two foreclosure sales, ongoing over a period of four years. Morgan concludes that a RICO cause of action was alleged principally because the mailing predicate acts involved distinct injuries over the extended period. Morgan has a good discussion of the terms "continuity" and "relationship" stating at page _____*:

> "Requiring both continuity and relationship among the predicate acts for the pattern requirement to be met is a sound theoretical concept that is not easily accomplished in practice. This is because the terms 'continuity' and 'relationship' are somewhat at odds with one another. Relationship implies that the predicate acts were comitted somewhat closely in time to one another. Relationship implies that the predicate acts were committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct. Continuity, on the other hand, would embrace predicate acts occurring at different points in time or involving different victims. To focus excessively on either continuity

* As soon as the 804 F.2d 970 advance sheet is received, the Court will supplement the record with the specific pages where this quote appears.

or relationship alone effectively negates the remaining prong. See Heritage Insurance, 629 F.Supp. at 1416. We acknowledge that subsequent to the Supreme Court's opinion in Sedima, the mere commission of two or more predicate acts within ten years of one another does not automatically constitute a pattern of racketering activity. To the degree that, prior to Sedima, we said that two predicate acts invariably constitute a pattern of racketeering activity, e.g., United States v. Witherspoon, 581 F.2d 595, 602 (7th Cir. 1978), such statements are no longer valid. The acts must demonstrate both a continuity and a relationship in order to constitute a pattern of racketeering activity. However, the proposition that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule. Otherwise defendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their acts, an untenable result.

Instead, we agree with those courts that have steered a middle course between these two extremes. In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., "transactions 'somewhat separated in time and place.'" Graham v. Slaughter, 624 F.Supp. 222, 225 (N.D.Ill. 1985) (quoting United States v. Moeller, 402 F.Supp. 49, 57-58 (D.Conn. 1975); see McLendon v. The Continental Group, Civ. A. No. 83-1340 (D.N.J. July 31, 1986) (adopting middle approach); Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co., 639 F.Supp. 1532 (D.Mass. 1986) (adopting the same approach). ..."

Then Morgan suggests:

". . . Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. ..." (Emphasis supplied)

The court continued:

> "However, the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement. The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative."

The Morgan court then explains that in the situation where a defendant defrauds a plaintiff by falsifying a loan application, even though two predicate act mailings may be involved, a pattern would be lacking, because it is a single transaction occurring at a single point in time. Ghouth v. Conticommodity Services, Inc., 642 F.Supp. 1325, 1337 (N.D.Ill. 1986). There would be but a single distinct or discreet injury, that of the loan transaction, although numerous mailings may be involved.

The Morgan court then pointed to the Seventh Circuit case of Lipin Enterprises Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986), wherein the court concluded the plaintiff failed to allege a pattern of racketeering activity where fraud was claimed in the acquisition of $960,000.00 worth of stock. Although there were numerous predicate acts, in Lipin, the court at page ___* of the Morgan opinion stated:

> ". . . The mere fact that the complexity of the transaction generates numerous pieces of paper and hence a greater number of possible fraudulent acts does not make these predicate acts ongoing over a period of time so as to constitute separate transactions that are distinct in time and place. Since these predicate acts were all made in a fairly short period of time (several months), and all clearly relate to the same transaction (the acquisition of a large block of stock), involve a single scheme and a single victim, and create a single injury, the acts in Lipin do not satisfy

* As soon as the 804 F.2d 970 advance sheet is received, the Court will supplement the record with the specific pages where this quote appears.

> the continuity aspect of the pattern of racketeering activity."

The Morgan court concludes by stating that in adopting the factually oriented standard, as opposed to a hard and fast set rule, the legal test is necessarily less than precise.

When the Court applies the Morgan pattern of racketeering activity factors to the alleged acts of Leiding in the instant matter, the pattern analysis is difficult and equivocal.

The dealings with Morse, Jenkins, First National of Sapulpa, Security National of Sapulpa, and Miguel's could involve various alleged predicate acts and victims in the overall alleged fraudulent scheme to remove Leiding from the Tejas loan guarantees. The entire alleged scheme took place over a period of approximately six to nine months in 1983. If the allegations of fraud are true, distinct injuries occurred to each victim at the time of the guaranty or loan substitution.

Both the legislative history (S.Rep. No. 617, 91st Cong., 1st Sess. 158 (1969))[6] and Sedima, 105 S.Ct. at 3285 n. 14 (1985), state that the threat of continuing activity is an element to consider relative to pattern. This implicates the question herein of whether there is a threat that Leiding would

6 "The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of Title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."

use his bank president position for related fraudulent personal gain in the future.

The allegations and evidence herein establish relationship in the predicate acts but the question remains of whether there is the element of continuity (including the threat of continued activity) sufficient to establish a pattern of racketeering activity. However, the doubt at this point will be resolved in plaintiff Morse's favor and the motion for summary judgment of Leiding is overruled regarding the RICO claim.

MOTION FOR SUMMARY JUDGMENT OF KNIGHT, TOWN AND COUNTRY BANK, AND LEIDING AS TO CLAIM OF INTERVENOR, FIRST NATIONAL BANK OF SAPULPA

The Court has permitted First National Bank of Sapulpa ("First National") to intervene as a party plaintiff. First National's complaint asserts two counts against Knight, Leiding and Town and Country Bank, one on a theory of common law fraud and the second asserts a claim under the RICO act, 18 U.S.C. §1961 et seq. Jurisdiction over First National's claim against said defendants centers in the federal statutory RICO claim.

In essence, First National has alleged that Leiding, as part of a scheme to relieve himself and Knight of liability for debts of Tejas Foods, requested that First National make a loan to Jenkins, Morse and Steele in the sum of $100,000.00. The proceeds of the loan were used to retire certain indebtedness at Bank of Oklahoma for which Leiding and Knight had potential liability as guarantors. First National asserts that in order to persuade First National to make such loan, Leiding instructed Jenkins to

prepare a false financial statement which Leiding transmitted to First National as an inducement to make such a loan. First National also contends that Leiding assured First National that the loan from First National to Jenkins, Morse and Steele would be repaid within 180 days out of the proceeds of a loan which Town and Country Bank intended to make to Jenkins, Morse and Steele. First National alleges that the loan has never been repaid and that the loss which First National has incurred on that note constitutes a loss sustained by reason of a "pattern of racketeering activity" engaged in by Knight, Leiding and Town and Country.

In its complaint First National employs conclusory RICO allegations against Leiding, Knight and Town and Country Bank which state the following:

> 12. Each of the Defendants, alone or in conjunction with other Defendants, has engaged in a pattern of racketeering activity as defined in 18 U.S.C., Section 1961(5), in that they have engaged in at least two acts of "racketeering activity" as defined in 18 U.S.C., Section 1961(1), which have occurred within the last two years, including, without limitation, multiple uses of instruments of interstate commerce in furtherance of violation of the Securities Act of 1933, 15 U.S.C. Section 71a et seq. and the Securities Exchange Act of 1934, 15 U.S.C. Section 78a et seq."

There is no evidence in the record to support that Leiding was acting as the agent with authority of Knight, either implied, actual, or apparent, in Leiding's dealings with the First National Bank of Sapulpa. (See pages 12-19 of this Order). Therefore, the motion for summary judgment of Knight as to First National's RICO claim is hereby sustained. As the Court's

jurisdiction on intervenor First National's claim against Knight is based on the RICO claim, the state pendent claims against Knight are dismissed without prejudice.

As previously stated in this Order, Town and Country Bank was not involved in the sale of a Tejas security. While it is unclear from the allegations of Morse and the record before the Court what the predicate acts of Town and Country to establish a RICO claim were, it is clear from the record that the activity of Leiding and others on behalf of Town and Country in dealing with First National concerning the subject $100,000.00 loan, do not satisfy the "pattern of racketeering activity" requirement as discussed in Sedima, S.P.R.L. v. Imrex Co., 437 U.S. ____, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986). (See this Order, pages 20-26) This is because in the single loan transaction there is lacking the continuity-plus-relationship to establish a pattern. Therefore, the motion for summary judgment of Town and Country concerning First National's RICO claim against it is hereby sustained. As the Court's jurisdiction on intervenor First National's claim against Town and Country is based on the RICO claim, the state pendent claims against Town and Country are dismissed without prejudice.

For the reasons previously expressed in this Order (pages 19-27) Leiding's motion for summary judgment on the claims of intervenor First National Bank of Sapulpa is hereby overruled.

In conclusion, Morse's and First National Bank of Sapulpa's action against defendants Knight and Town and Country Bank is dismissed and the action will proceed on the claims of plaintiff Morse and intervenor First National Bank of Sapulpa against the defendant Leiding only.

The following pretrial schedule is provided:

1) Exchange the names and addresses of all witnesses, including experts (stating briefly the gist of the witness' testimony unless the witness' deposition has been taken) by February 16, 1987;

2) Discovery cut off is March 13, 1987;

3) Final pretrial conference is set for April 1, 1987, at 2:30 P.M.

4) Final pretrial order (exchange and premark all exhibits) by April 6, 1987;

5) Requested voir dire, requested instructions, motions in limine, and any trial brief a party wishes to file by April 9, 1987;

6) Jury trial is set for April 20, 1987.

IT IS SO ORDERED this 22nd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA,	)	
Plaintiff,	)	
vs.	)	No. 86-C-977-C
FIDATA TRUST COMPANY OF NEW YORK, a New York corporation; FIDATA SECURITIES MANAGEMENT, INC., a Delaware corporation; THE BANK OF NEW YORK CO., a Delaware corporation; THE BANK OF NEW YORK CO., INC. and THE BANK OF NEW YORK TRUST COMPANY,	)	
Defendants.	)	

NOTICE
~~STIPULATION~~ OF DISMISSAL

The Plaintiff, THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, a national banking association ("First Tulsa"), by and through its attorneys, Conner & Winters, by P. David Newsome, Jr., M. E. McCollam, and David R. Cordell, and the Defendants, FIDATA TRUST COMPANY OF NEW YORK, a New York corporation, FIDATA SECURITIES MANAGEMENT, INC., a Delaware corporation, THE BANK OF NEW YORK CO., a Delaware corporation, THE BANK OF NEW YORK CO., INC. and THE BANK OF NEW YORK TRUST COMPANY, by and through their attorneys, Maione & Collins, by Chris Collins, and pursuant to Rule 41, Federal Rules of Civil Procedure, stipulate as follows:

1. On October 31, 1986, Plaintiff filed its Complaint against the above-named Defendants.

2. Plaintiff and Defendants have entered into a Settlement Agreement resolving the dispute which is the subject of the instant action.

3. Plaintiff agrees and stipulates that it shall dismiss the captioned action with prejudice, each party to bear its respective costs in this suit.

NOW, THEREFORE, subject to the Order of this Court, Plaintiff, First Tulsa, dismisses its causes of action against the Defendants Fidata Trust Company of New York, Fidata Securities Management, Inc., The Bank of New York Co., The Bank of New York Co., Inc. and The Bank of New York Trust Company, and each of them, with prejudice.

Dated this 24th day of December, 1986.

P. DAVID NEWSOME, JR.
M. E. McCOLLAM
DAVID R. CORDELL

By David R. Cordell

CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Plaintiff
THE FIRST NATIONAL BANK AND
TRUST COMPANY OF TULSA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PROSPECTIVE INVESTMENT AND TRADING COMPANY, LTD., an Oklahoma corporation; PROSPECTIVE GROUP 1981-III LTD., a Louisiana partnership in Commendam; and R. C. HICKMAN,	)	
Plaintiffs,	)	
vs.	)	Case No. 86-C-986 C
PRODUCER'S GAS COMPANY, a Texas corporation,	)	
Defendant.	)	

JUDGMENT

In this action, the Defendant, Producer's Gas Company, a Texas corporation, has been regularly served with summons and complaint, and has failed to plead or otherwise defend. The legal time for pleading or otherwise defending has expired and the default of the Defendant, Producer's Gas Company, in the premises has been duly entered according to law. Upon the application of said Plaintiffs, judgment is hereby entered against Defendant in pursuant to the complaint filed in this action.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered by Plaintiffs and against Defendant in the amount of $1,603,138.79, together with interest through December 10, 1986, of $373,757.11 for a total of $1,976,895.90, together with interest thereon at the legal rate of interest, after December 10,

1986, together with the award of all costs incurred in this action and a reasonable attorneys' fee to be determined upon application of Plaintiffs.

Judgment entered this ____ day of December, 1986.

H. DALE COOK

H. DALE COOK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JERRY L. PHILLIPS,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-1025-B

DEC [illegible] 86

[illegible]
U.S. [illegible]

AGREED JUDGMENT

This matter comes on for consideration this 23rd of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Jerry L. Phillips, appearing pro se.

The Court, being fully advised and having examined the file herein, finds that the Defendant, Jerry L. Phillips, acknowledged receipt of Summons and Complaint on November 21, 1986. The Defendant has not filed an Answer but in lieu thereof has agreed that he is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against him in the amount of $335.98, plus interest at the rate of 15.05 percent per annum and administrative costs of $.61 per month from December 5, 1983, $.68 per month from January 1, 1984, and $.67 per month from February 1, 1985, until judgment, plus interest thereafter at the legal rate from the date of judgment until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Jerry L. Phillips, in the amount of $335.98, plus interest at the rate of 15.05 percent per annum and administrative costs of $.61 per month from December 5, 1983, $.68 per month from January 1, 1984, and $.67 per month from February 1, 1985, until judgment, plus interest thereafter at the current legal rate of 5.77 percent from the date of judgment until paid, plus the costs of this action.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

Phil Pinnell
PHIL PINNELL
Assistant U.S. Attorney

Jerry L. Phillips
JERRY L. PHILLIPS

WITH CREDIT GIVEN FOR $30.00 PAID 10/20/86 PER MY PERSONAL CHECK #926, ON THE ABOVE INDEBTEDNESS. PLEASE.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE SWIGER, Plaintiff, v. WILLBROS ENERGY SERVICES COMPANY, a Delaware corporation; BOBBY MOSELEY; PIPELINERS LOCAL UNION NO. 798 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; CLIFTON THRONEBERRY; and DOYLE HENDRIX, Defendants.	)	No. 85-C-180-B

ORDER RE DEFENDANTS PIPELINERS LOCAL UNION NO. 798, THRONEBERRY AND HENDRIX' MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(6)

The plaintiff, George Swiger ("Swiger"), filed this action against Willbros Energy Services Company ("Willbros"), Bobby Moseley ("Moseley"), Pipeliners Local Union No. 798 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Local 798"), Clifton Throneberry ("Throneberry"), and Doyle Hendrix ("Hendrix") on May 1, 1986. Jurisdiction is based upon diversity of citizenship and presence of the jurisdictional amount. For the reasons set out below, the motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) of defendants Local 798, Throneberry, and Hendrix is sustained.

In the First Amended Complaint Swiger alleges that the defendant Bobby Moseley ("Moseley") acting as an agent and employee of defendant Willbros Energy Services Company ("Willbros"), offered employment to plaintiff as welder-foreman of defendant Willbros. It is alleged that during conversations between Moseley and Swiger, Moseley offered and Swiger accepted employment by Willbros as welder-foreman. Swiger alleges the employment agreement was with the understanding that at those times when Swiger was not actively working, he would be paid "standby" pay by defendant Willbros in the amount of $275.00 per week. Swiger alleged it was contemplated that he would be employed by defendant Willbros as long as there was work and that he could only be terminated for just cause. The employment agreement was oral.

Swiger worked under the employment agreement as welder-foreman from approximately May 1982 until December 18, 1982, when the pipeline job upon which he was working terminated due to inclement weather. Swiger alleges that at all times since December 18, 1982, Willbros has failed and refused to pay "standby" pay to him and has failed and refused to return him to work as agreed.

In August 1983 Swiger was informed by Moseley that he was not going to be returned to work and that Swiger's services were no longer needed by Willbros due to alleged "personality conflict." Swiger contends at all times his work performance was satisfactory and that he was not terminated for just cause.

Concerning the defendants Local 798, Throneberry, and Hendrix, it is alleged that between December 1982 and August 1983, said defendants maliciously and wrongfully interfered with the contractual relationship that existed between Swiger and Willbros by exerting undue and improper influence on defendant Willbros' employees to no longer employ Swiger. It is alleged said defendants acted in concert with Moseley to terminate the plaintiff and to refuse to employ him in the pipeline industry. Swiger contends this action was directed against him because as welder-foreman on the pipeline he would not hire and staff his work crews with union members favored by Throneberry and Hendrix.

Swiger alleges that the defendants affirmatively concealed their wrongful acts. It is alleged in August 1983 defendant Moseley and defendants Throneberry and Hendrix, acting on behalf of the defendant union, affirmatively represented to Swiger that Throneberry, Hendrix and Local 798 had no part in the decision of defendants Willbros and Moseley not to continue to employ Swiger. Then Swiger alleges that through the use of reasonable diligence, he has only recently discovered the aforementioned facts so as to justify the tolling of any applicable statute of limitations.

It is alleged that the acts of the defendants were intentional, grossly negligent and reckless, and were in wanton disregard of Swiger's rights and justified the awarding of exemplary damages.

The claims made against the defendants Throneberry, Hendrix and Local 798 are that of tortious bad faith wrongful

termination, the tort of blacklisting in violation of 40 Okl.St. Ann. §172, and malicious interference with contractual relations. Swiger seeks reinstatement in a comparable position by Willbros, lost wages and benefits, damages for mental pain and suffering, punitive damages, attorneys' fees and costs.

The alleged tortious bad faith wrongful termination claim, should one exist under Oklahoma law, would exist between the employer and employee, not parties without privity such as Local 798, Throneberry, and Hendrix. Further, any such alleged tortious wrongful termination would involve a two-year limitation period under 12 Okl.St.Ann. §95.

Swiger alleges that it was in August 1983 that Willbros' representative advised him that his services were no longer needed and he would not be returned to work. Therefore, Swiger, if possessed of an employment termination cause of action, could first have maintained the action to a successful conclusion in August 1983. The statute of limitations commenced at the latest in August of 1983, unless tolled for some legally justifiable reason.

In the First Amended Complaint the plaintiff alleges the defendants affirmatively concealed their alleged wrongful acts. It is not alleged that there was fraudulent concealment. Plaintiff alleges that in 1983 the defendants stated that Local 798, Throneberry, and Hendrix were not involved in Willbros' decision to discontinue plaintiff's employment. It is stated in Kansas City Life Ins. Co. v. Nipper, 51 P.2d 741 at 747 that the

mere failure to disclose that a cause of action exists is not sufficient to prevent the running of the statute.

Plaintiff's allegations of due diligence are conclusory. No facts are alleged why plaintiff was unable to learn of existing facts between August 1983 and August 1985. Kansas City Life Ins. Co., at 747 points up that plaintiff cannot set up successfully a fraudulent concealment of his cause of action if his failure to discover it is attributable to his own negligence, especially where there is no trust relationship between the parties that would give rise to a duty to disclose. 37 C.J. 974. Mere ignorance of the existence of a cause of action or facts constituting such on the part of the person in whom the cause of action lies will not toll the running of the statute of limitations. Moore v. Delivery Services, Inc., 618 P.2d 408 (Okl. App. 1980). For there to be tolling of a period of limitation on a theory of fraudulent concealment there must be an allegation of facts supporting the concealment. Edwards v. Andrews, Davis, Legg, Bixler, Milsten & Murrah, Inc., 650 P.2d 857, 958 (Okl. 1982). The denial of moving defendants to the effect that they were not involved in Willbros' decision to discontinue plaintiff's emplcyment is not unlike a driver of an automobile denying that he ran through a red traffic signal. Such a denial would not toll the period of limitations. The allegations in the amended complaint are insufficient to have tolled the two-year limitaticns period as to defendants Local 798, Throneberry, and Hendrix.

As the moving defendants point out in their pleading and brief, under Oklahoma law a contract of employment for a term in excess of one year is unenforceable unless it is in writing. 15 Okl.St.Ann. §136; St. Louis Trading Co. v. Barr, 32 P.2d 293 (Okl. 1934); Morris Plan Company v. Campbell, 67 P.2d 52 (Okl. 1937); B.F.C. Morris Co. v. Mason, 39 P.2d 1 (Okl. 1935). The alleged employment agreement herein was oral. Therefore, plaintiff's third claim for relief against the moving defendants fails to state a cause of action.

Plaintiff's alleged fourth claim is for relief for blacklisting pursuant to 40 Okl.St.Ann. §172 which states:

> "No firm, corporation or individual shall blacklist or require a letter of relinquishment, or publish, or cause to be published, or blacklisted, any employee, mechanic or laborer, discharged from or voluntarily leaving the service of such company, corporation or individual, with intent and for the purpose of preventing such employee, mechanic or laborer, from engaging in or securing similar or other employment from any other corporation, company or individual."

The language of the statute specifically refers to the employer. Since the defendants, Local 798, Throneberry, and Hendrix, were not plaintiff's employer, plaintiff's claim against them under said statute is also without merit. The period of limitation on such a claim would be for two years, pursuant to 12 Okl.St.Ann. §95 (Third). For the reasons previously stated, and as reflected by the face of the First Amended Complaint, such limitation period has expired.

The plaintiff's fifth claim for relief against defendants Local 798, Throneberry, and Hendrix for intentional interference

with contractual relations is likewise barred by Oklahoma's two-year limitation (12 Okl.St.Ann. §95 (Third)) for the reasons previously stated.

For the aforesaid reasons Local 798, Throneberry, and Hendrix' motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is hereby sustained. A separate Judgment pursuant to this order in favor of the defendants Local 798, Throneberry, and Hendrix and against the plaintiff will be entered contemporaneous herewith.

IT IS SO ORDERED this 23rd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE SWIGER, Plaintiff, v. WILLBROS ENERGY SERVICES COMPANY, a Delaware corporation; BOBBY MOSELEY; PIPELINERS LOCAL UNION NO. 798 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; CLIFTON THRONEBERRY; and DOYLE HENDRIX, Defendants.	)	No. 85-C-180-B

J U D G M E N T

In keeping with the Court's order sustaining the defendants Pipeliners Local Union No. 798 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Clifton Throneberry and Doyle Hendrix' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), Judgment is hereby entered in favor of said defendants, and each of them, and against the plaintiff, George Swiger; with costs herein to be assessed against the plaintiff.

DATED this 23rd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE SWIGER, Plaintiff,	)	
v.	)	NO. 85-C-180-B
WILLBROS ENERGY SERVICES COMPANY, a Delaware corporation; BOBBY MOSELEY; PIPELINERS LOCAL UNION NO. 798 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; CLIFTON THRONEBERRY; and DOYLE HENDRIX, Defendants.	)	

ORDER RE DEFENDANTS WILLBROS ENERGY SERVICES COMPANY AND MOSELEY'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(6)

The plaintiff, George Swiger ("Swiger"), filed this action against Willbros Energy Services Company, in the United States District Court for the Northern District of West Virginia on January 20, 1984. In that complaint the plaintiff sought money damages for alleged breach of an employment contract including allegations of intentional malicious wanton conduct seeking exemplary damages.

The original action was transferred to this court and then on May 1, 1986, the plaintiff filed an amended complaint herein adding the additional parties defendant. Jurisdiction is based upon diversity of citizenship. The Court has by separate order ruled on the motion to dismiss of Pipeliners Local Union No. 798 of the United Association of Journeymen and Apprentices of the

Plumbing and Pipe Fitting Industry of the United States and Canada ("Local 798"), Clifton Throneberry ("Throneberry"), and Doyle Hendrix ("Hendrix"), and now addresses the motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) of defendants Willbros Energy Services Company ("Willbros") and Bobby Moseley ("Moseley").

In the First Amended Complaint Swiger alleges that the defendant Bobby Moseley (joined as a defendant May 1, 1986) acting as an agent and employee of defendant Willbros offered employment to plaintiff as welder-foreman of defendant Willbros. It is alleged that during conversations between Moseley and Swiger, Moseley offered and Swiger accepted employment by Willbros as welder-foreman. Swiger alleges the employment agreement was with the understanding that at those times when Swiger was not actively working, he would be paid "standby" pay by defendant Willbros in the amount of $275.00 per week. Swiger alleged it was contemplated that he would be employed by defendant Willbros as long as there was work and that he could only be terminated for just cause. The employment agreement was oral.

Swiger worked under the employment agreement as welder-foreman from approximately May 1982 until December 18, 1982, when the pipeline job upon which he was working terminated due to inclement weather. Swiger alleges that at all times since December 18, 1982, Willbros has failed and refused to pay "standby" pay to him and has failed and refused to return him to work as agreed.

In August 1983 Swiger was informed by Moseley that he was not going to be returned to work and that Swiger's services were no longer needed by Willbros due to alleged "personality conflict." Swiger contends at all times his work performance was satisfactory and that he was not terminated for just cause.

It is alleged that Moseley, as supervisor for Willbros, acted in concert with the other defendants to terminate plaintiff and to refuse to employ him in the pipeline industry. Swiger contends this action was directed against him because as welder-foreman on the pipeline he would not hire and staff his work crews with union members favored by union representatives Throneberry and Hendrix.

Swiger alleges that the defendants affirmatively concealed their wrongful acts. It is alleged in August 1983 Moseley and defendants Throneberry and Hendrix, acting on behalf of the defendant union, affirmatively represented to Swiger that Throneberry, Hendrix, and Local 798 had no part in the decision of defendants Willbros and Moseley not to continue to employ Swiger. Then Swiger alleges that through the use of reasonable diligence, he has only recently discovered the aforementioned facts so as to justify the tolling of any applicable statute of limitations.

It is alleged that the acts of the defendants were intentional, grossly negligent and reckless, and were in wanton disregard of Swiger's rights and justified the awarding of exemplary damages.

The claims against the defendants Willbros and Moseley are:

First claim - breach of contract against defendant Willbros;

Second claim - mispresentation and detrimental reliance against defendant Willbros;

Third claim - tort of wrongful termination against defendant Willbros;

Fourth claim - blacklisting against defendants Willbros and Moseley;

Fifth claim for relief - interference with contractual relations against defendant Moseley.

The plaintiff seeks reinstatement, lost wages and benefits, general damages for mental pain and suffering, punitive damages, costs and attorneys fees.

The defendants Willbros and Moseley, wherein they are named, seek to dismiss plaintiff's second, third, fourth and fifth claims for relief and to partially dismiss plaintiff's first claim for relief.

Plaintiff's first claim for relief is captioned "BREACH OF CONTRACT" against Willbros, then in the body it is alleged as a bad faith breach of contract. Since the third claim for relief is against Willbros too, and claims tortious bad faith wrongful termination, the Court assumes the first claim sounds in breach of contract and not tort.

Defendant Willbros argues that under Hall v. Farmers Insurance Exchange, 713 P.2d 1027 (Okla. 1985), no tort cause of action results from such employment termination and that

plaintiff's damages for the breach of implied obligation of good faith are limited to benefits earned but not paid prior to termination. Thus, Willbros contends plaintiff's damages should be limited to a time from December 1982 to August 1983. It should be observed that Hall was an alleged breach of employment at will case but the instant matter is an alleged termination for cause only case.[1] The gist of plaintiff's first claim seems to be that Willbros breached the contract by terminating same without just cause. Defendants' motion to dismiss the plaintiff's first claim is overruled.

Plaintiff's second claim for relief against defendant Willbros in the First Amended Complaint is for "MISREPRESENTATION AND DETERIMENTAL RELIANCE." Although not specifically stated, the Court assumes such is alleged fraudulent misrepresentation. It is questionable that plaintiff has complied with Fed.R.Civ.P. 9(b) and alleged fraud with particularity. However, the motion to dismiss will be overruled in regard to the second claim because it is clear the litigable issues in the entire matter are going to have to be further refined by the Fed.R.Civ.P. 56 process. 15 Okl.St.Ann. §136 may be an overriding consideration in this regard.

As for the statute of limitations (12 Okl.St.Ann. §95 (Third)) - two years - relative to the second claim, it is

[1] 15 Okl.Stat.Ann. §136 provides that a contract of employment in excess of one year is not enforceable unless in writing. While defendant Willbros set up an affirmative defense of statute of frauds in its original answer, such has not been yet asserted to the amended complaint nor in the motion to dismiss or brief in support.

difficult from plaintiff's amended complaint to determine just when the period of limitations should commence. Plaintiff alleges that since December 1982 he was not paid "standby" pay and returned to work as agreed, then in August 1983 he was advised by Willbros' representative that his employment would not be continued. Would plaintiff's cause of action commence in January 1983, the first month he was not paid, February, the second month he was not paid, etc.? It is clear, however, that as to Willbros any statute of limitations computation should relate to the filing of the initial complaint on January 20, 1984. Fed.R.Civ.P. 15(c). The statute of limitations as to Willbros had also best await the Rule 56 process, but because of the fact the original complaint filing of January 20, 1984 is determinative, it is doubtful Willbros has a valid statute of limitations defense.

Plaintiff's third claim for relief is for tortious wrongful termination by the defendant Willbros.

As previously stated, the substance of plaintiff's claim is the breach of an agreement (oral) to provide him employment as well as "standby" pay and terminate same only for "just cause". Therefore, the instant matter does not involve termination of an employment at will as did Hall v. Farmers Insurance Exchange, 713 P.2d 1027 (Okla. 1985). Hall held that a cause of action may exist for breach of a parties implied covenant of good faith by wrongfully resorting to the termination at will clause. The Tenth Circuit Court of Appeals in Grayson v. American Airlines, Inc.,

803 F.2d 1097 (10th Cir. 1986)[2], recently acknowledged Oklahoma's commitment to such implied covenant of good faith and rejected appellant's contention that it applied only to claims of terminated employees at will for earned benefits to be paid in the future, stating:

> ". . . The plain language and the Hall court's holding indicate the opposite -- that good faith is mandated in all contracts. We view this as a clear indication that the Oklahoma courts have recognized an implied covenant of good faith in contractual dealings." Grayson at 1099.

The Court does not read Hall to provide a tort cause of action for bad faith breach of contract. In Solberg v. Reading & Bates Corporation, No. 85-C-158-B (N.D. Okla. November 18, 1985) this Court dismissed a wrongful discharge tort claim asserted under Hall. The Court noted:

> "Plaintiff reads Hall too broadly. The plaintiff in Hall did not pursue a cause of action sounding in tort. Further, the Oklahoma Supreme Court's recognition of an implied covenant of good faith between the parties to every contract does not create tort damages for breach thereof."

However, under Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977), and its progeny, a tort cause of action exists for breach of the implied duty to act in good faith and deal fairly. Christian dealt with the specific obligations of an insurer to an insured under their written contract. Christian

2 Neither Hall nor Grayson adequately discuss the damages to which a plaintiff is entitled for breach of the implied covenant of good faith. Hall allowed damages only for commissions earned after termination to which rights had vested prior to termination. Grayson did not address the damage issue. A plaintiff would probably be required to mitigate his damages.

made the specific point that insurance is a quasi public industry largely regulated by government and that the insurer has a superior bargaining position.

The plaintiff contends that reading Christian in conjunction with Hall, particularly in light of the recent Oklahoma Court of Appeals decision in Hinson v. Cameron, 57 O.B.J. 1229 (May 15, 1986), establishes that Oklahoma now recognizes a tort cause of action for breach of the duty of the parties to an employment at will contract to deal fairly and in good faith with reference to termination. The Court does not understand that the decision in Hinson has been approved for publication under 20 Okl.Stat.Ann. §30.5 so it should not be considered binding precedent. It is also noteworthy that Hinson does not cite Hall as authority for a tort cause of action. The tort claim approved in Christian resulting from the breach of the insurance contract is not analogous to the oral employment contract alleged breach herein. It should be noted that no such Christian tort cause of action exists where there is a legitimate dispute between the parties. Norman's Heritage Real Est. v. Aetna Cas. & Sur., 727 F.2d 912 (10th Cir. 1984); Manis v. The Hartford Fire Ins. Co. and Aetna Cas. & Sur. Co., 681 P.2d 760 (Okl. 1984); and McCorkle v. Great-American Insurance Co., 637 P.2d 583 (Okl. 1981). However, the Court will overrule the defendant Willbros' motion to plaintiff's third claim and await further consideration of it at the time of the motion under Rule 56. Again it must be stated that the implications of 15 Okl.St.Ann. §136 may render the entire discussion moot.

Plaintiff's fourth claim for relief is for alleged blacklisting under 40 Okl.St.Ann. §172 and is against all defendants, which includes both Willbros and Moseley.

40 Okl.St.Ann. §172 states:

> "No firm, corporation or individual shall blacklist or require a letter of relinquishment, or publish, or cause to be published, or blacklisted, any employee, mechanic or laborer, discharged from or voluntarily leaving the service of such company, corporation or individual, with intent and for the purpose of preventing such employee, mechanic or laborer, from engaging in or securing similar or other employment from any other corporation, company or individual."

The defendants contend, pursuant to State v. Dabney, 141 P.2d 303 (Okl. 1943), that publication under 40 Okl.St.Ann. §172 requires a written communication. Dabney was an alleged criminal case and did state that "blacklisting" meant the making of a written "list" for circulation. Dabney invoked the rule of strict construction of a penal statute. The Court thinks such interpretation is too narrow for the purposes of an alleged civil blacklisting claim. Such publication could be oral as well as written. Black's Law Dictionary. To establish such an oral list would place a considerable burden upon the plaintiff, but with appropriate proof a civil claim of blacklisting under the statute could be established. As to Willbros, should such a cause of action exist, it could constitute a continuing tort and the period of limitation not a bar.

As for the blacklisting claim against the defendant Moseley, 40 Okl.Stat.Ann. §172 refers to the employer and Moseley was not the employer. State v. Dabney, 141 P.2d 303 (Okla. 1943).

Therefore, the motion to dismiss by the defendant Moseley is well taken.

Plaintiff's fifth claim for relief is for interference with contractual relations alleged against Moseley, Local 798, Throneberry, and Hendrix. Such a claim sounds in tort. For the reasons stated in the order sustaining the motions to dismiss of Local 798, Throneberry, and Hendix (pp. 4-5), as to Moseley, the two-year period of limitation pursuant to 12 Okl.St.Ann. §95 (Third) has expired. The latest the alleged interference occurred was August 1983 and the amended complaint joining Moseley was not filed until May 1, 1985.

Further, an agent acting within the scope of his authority, as alleged herein, cannot be held liable for interfering with or inducing his principal to breach a contract between his principal and a third party, because to hold him liable would be to hold the corporation liable in tort for breaching its contract. Allison v. American Airlines, 112 F.Supp. 37 (N.D.Okla. 1953); Boyce v. American Liberty Ins. Co., 204 F.Supp. 317, 318 (D.Conn. 1962); see also Kecko Piping Co. v. Monroe, 172 Conn. 197, 202, 374 A.2d 179 (1977); Shaw v. Merrick, 160 A.D.2d 830, 401 N.Y.S.2d 508, 509 (1st Dep. 1978); Bowman v. Grolsche Bier Brouwerij B.V., 474 F.Supp. 725, 733 (D.Conn. 1979); and Houser v. City of Redmond, 586 P.2d 482 (Wash. 1978)(en banc). Therefore, the motion to dismiss plaintiff's fifth claim of the defendant Moseley is hereby sustained.

In conclusion, the action will proceed as stated against the defendant Willbros under plaintiff's first, second, third and fourth claims, and the action is to be dismissed as to the defendant Moseley.

IT IS SO ORDERED this 23rd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE SWIGER, Plaintiff, v. WILLBROS ENERGY SERVICES COMPANY, a Delaware corporation; BOBBY MOSELEY; PIPELINERS LOCAL UNION NO. 798 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; CLIFTON THRONEBERRY; and DOYLE HENDRIX, Defendants.	)	No. 85-C-180-B

J U D G M E N T

In keeping with the Court's order sustaining defendant Bobby Moseley's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), Judgment is hereby entered in favor of said defendant and against the plaintiff, George Swiger; with costs to be assessed against the plaintiff.

Dated this 23rd day of December, 1986.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM F. WEBSTER, Plaintiff,	)	
v.	)	86-C-930-C
T. JACK GRAVES, DISTRICT ATTORNEY, DAVID POPLIN, ASSISTANT DISTRICT ATTORNEY, et al, Defendants.	)	

ORDER

The Court has for consideration the Findings and Recommendation of the Magistrate filed December 4, 1986, in which the Magistrate recommended that the motion to dismiss of defendants Graves and Poplin be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Findings and Recommendation of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that the motion to dismiss defendants Graves and Poplin from this action is granted.

Dated this 23rd day of December, 1986.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. DAN R. MULVIHILL, a single person; MILLER PROPERTIES, INC., an Oklahoma corporation; PIONEER SAVINGS AND TRUST COMPANY; TRI-COM CORPORATION, an Oklahoma corporation, d/b/a Chase and Associates; BANK OF COMMERCE AND TRUST COMPANY; SECURITY BANK, an Oklahoma banking corporation; JAMES ELKINS; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 85-C-35-C

DEFICIENCY JUDGMENT

Now on this 23 day of Dec, 1986, there came on for hearing the Motion of the Plaintiff United States of America for leave to enter a Deficiency Judgment herein, said Motion being filed on December 10, 1986, and a copy of said Motion being mailed to H. I. Aston, Attorney for Defendant Dan R. Mulvihill, 3242 East 30th Place, Suite A, Tulsa, Oklahoma 74114 and all other counsel of record. The Plaintiff, United States of America, acting on behalf of the Administrator of Veterans Affairs, appeared by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Dan R. Mulvihill, appeared neither in person nor by counsel.

The Court upon consideration of said Motion finds that the amount of the Judgment rendered herein on April 30, 1986, in favor of the Plaintiff United States of America, and against the Defendant, Dan R. Mulvihill, with interest and costs to date of sale is $29,471.86.

The Court further finds that the appraised value of the real property at the time of sale was $25,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered April 30, 1986, for the sum of $19,933.00 which is less than the market value.

The Court further finds that the Plaintiff, United States of America on behalf of the Administrator of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Dan R. Mulvihill, as follows:

Principal Balance as of 09/17/86	$20,478.30
Interest	7,832.65
Late Charges	365.40
Appraisal	125.00
Management Broker Fees	520.00
Court Costs	150.51
TOTAL	$29,471.86
Less Credit of Appraised Value	- 25,000.00
DEFICIENCY	$ 4,471.86

plus interest on said deficiency judgment at the legal rate of 5.77 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Administrator of Veterans Affairs have and recover from Defendant, Dan R. Mulvihill, a deficiency judgment in the amount of $4,471.86, plus interest at the legal rate of 5.77 percent per annum on said deficiency judgment from date of judgment until paid.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEC 23 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

H.K. AUTO SUPPLY, INC., a corporation,	)	
Plaintiff,	)	
vs.	)	No. 85-C-914-E
ALCO PARTS CO., INC., a Missouri corporation, and ALCO PARTS COMPANY, an Oklahoma corporation,	)	
Defendants.	)	

DISMISSAL WITHOUT PREJUDICE

COMES NOW, Carl A. Barnes, attorney for the Plaintiff above named, and hereby dismisses the above cause without prejudice.

Dated this 15 day of Dec, 1986.

Carl A. Barnes
Bernard, Barnes & Womack
Attorneys for Plaintiff
2727 E. 21st, Suite 305
Tulsa, Oklahoma 74114
918-747-9671

CERTIFICATE OF MAILING

23 I, Carl A. Barnes, do hereby certify that on this day of Dec, 1986, I mailed a true and correct copy of the foregoing dismissal with proper postage thereon prepaid to Joseph G. Breaune, Attorney for Defendant, P.O. Box 150, Miami, Oklahoma 74355.

CARL A. BARNES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, v. DAVID ALAN ISELEY, RICHARD BRINTON WILES, KIMBERLY ANN CLAPP, ESTATE OF JASON MARSHALL, JEANNE H. WILES, MR. TOM MARSHALL, MRS. TOM MARSHALL MR. KENNETH CLAPP, and MRS. KENNETH CLAPP, Defendants. MR. KENNETH CLAPP and MRS. KENNETH CLAPP, as Father and Mother and Next Friend of KIMBERLY ANN CLAPP, Cross-Plaintiffs, and RICHARD BRINTON WILES and his Mother, JEANNE H. WILES; DAVID ALAN ISELEY and his Father and Mother, MR. DAVID ISELEY and MRS. DAVID ISELEY, Cross-Defendants.	)	No. 85-C-901-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby granted in favor of the plaintiff, State Farm Mutual Automobile Insurance Company, and against the named captioned defendants; the Court having determined that the defendant, David Alan Iseley, was not extended coverage by the subject insurance policy when on May 4,

1985, he was driving a 1984 Ford pickup vehicle, owned by the defendant Jeanne H. Wiles, and at which times said vehicle was involved in an accident resulting in loss of life of Jason Todd Marshall. The parties are to pay their own respective costs and attorneys fees.

DATED this 23rd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHARLES J. ANDERSON,	)	
	)	
Defendant.	)	CIVIL ACTION NO. 86-C-241-C

NOTICE OF DISMISSAL

COMES NOW the United States of America by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 23 day of December, 1986.

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

Phil Pinnell

PHIL PINNELL
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 23 day of December, 1986, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Charles J. Anderson, 733 West 13th Street, Tulsa, Oklahoma 74119.

Phil Pinnell
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

COC ENERGY, INC., and FINANCIAL MINERAL CORPORATION,	)	
Plaintiffs,	)	No. 84-C-292-C
v.	)	
EL PASO NATURAL GAS COMPANY,	)	
Defendant,	)	
JOSEPH F. HOFFMAN, JOHN M. BEARD, and CHASE MANHATTAN BANK, N.A., as Agent,	)	
Intervenors and Third-Party Plaintiffs.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Intervenors Joseph F. Hoffman and John M. Beard and Defendant El Paso Natural Gas Company and, pursuant to Rule 41(a)(1)(ii) Fed. R. Civ. P., dismisses each and every claim asserted herein by said Intervenors against said Defendant with prejudice, pursuant to the agreement of said parties.

Stephen Jones
JONES & JENNINGS
Post Office Box 472
Enid, Oklahoma 73702
ATTORNEY FOR INTERVENORS

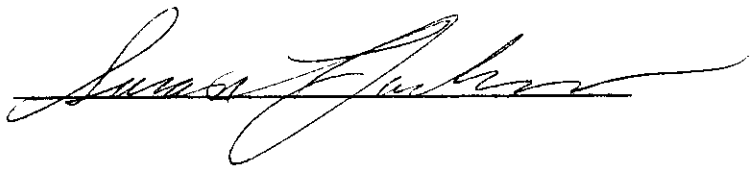
Susan L. Jackson
Hall, Estill, Hardwick, Gable,
Collingsworth & Nelson, Inc.
4100 Bank of Oklahoma Tower
Tulsa, Oklahoma 74172
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of December, 1986, a true and correct copy of the above and foregoing instrument was mailed to the following, with sufficient prepaid postage having been affixed thereto.

Lance Stockwell, Esq.
Malcom E. Rosser IV, Esq.
Boesche, McDermott & Eskridge
ONEOK Plaza
Tulsa, Oklahoma 74103

Stephen Jones, Esq.
Jones & Jennings
Suite 1100 Broadway Tower
P. O. Box 472
Enid, Oklahoma 73702



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNION BANK AND TRUST, Bartlesville, Oklahoma,	)	
Plaintiff,	)	
vs.	)	No. 86-C-775 B
CUTLERY WORLD CORP., an Illinois corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Order of Dismissal filed herein by the parties and the consent of all parties signified thereon, it is hereby

ORDERED that the above action be dismissed with prejudice, with each party to bear its own costs.

S/ THOMAS R. BRETT

DISTRICT JUDGE

APPROVED:

Attorney for Plaintiff

Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	
JUDY L. MAURER, a/k/a JUDY MAURER	)	
Defendant.	)	CIVIL ACTION NO. 86-C-887-B

DEFAULT JUDGMENT

This matter comes on for consideration this 22nd day of December, 1986, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Judy L. Maurer, a/k/a Judy Maurer, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Judy L. Maurer, a/k/a Judy Maurer acknowledged receipt of Summons and Complaint on October 25, 1986. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Judy L. Maurer, a/k/a Judy Maurer, for the principal sum of $2,055.70, plus accrued interest of $229.82 as of July 30, 1986, plus interest thereafter at the rate of 3 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.77 percent per annum until paid.

/s/ RICHARD K. EBEL

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY ABELDT,

Plaintiff,

vs.

GENE WILLIAMS CHEVROLET and CAROLYN RASHAEL McDONALD,

Defendants.

No. 86-C-729-C

O R D E R

The Court has before it plaintiff's motion to transfer the above-captioned matter to the Eastern District of Oklahoma. Plaintiff asserts that venue properly lies in the Eastern District in that his claim arose in Pittsburg County, Oklahoma. Plaintiff also informs the Court that he has not perfected service on the defendants.

The Court finds, pursuant to 28 U.S.C. §1391(b), that proper venue lies in the Eastern District of Oklahoma. It is therefore the Order of the Court that plaintiff's motion to transfer the above-captioned case to the Eastern District of Oklahoma as the situs where the action arose is hereby granted.

IT IS SO ORDERED this 22nd day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TRUCK INSURANCE EXCHANGE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 86-C-122-C
	)	
TED FRY,	)	
	)	
Defendant.	)	

J U D G M E N T

This matter came before the Court on the parties' cross motions for summary judgment. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Judgment be entered in behalf of plaintiff Truck Insurance Exchange and against the defendant Ted Fry on plaintiff's claim for declaratory judgment.

IT IS SO ORDERED this 22nd day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EMPIRE FIRE AND MARINE INSURANCE COMPANY, Plaintiff,	)	
vs.	)	No. 85-C-713-C
GUARANTY NATIONAL INSURANCE COMPANY, Defendant.	)	

J U D G M E N T

This action came on before the Court on the parties' cross motions for summary judgment. The issues having been duly considered and a decision having been duly rendered as contained in the Court's Order dated December 19, 1986,

IT IS ORDERED AND ADJUDGED that Judgment be entered in behalf of plaintiff Empire Fire and Marine Insurance Company and against defendant Guaranty National Insurance Company on plaintiff's claim for declaratory judgment.

IT IS SO ORDERED this 22nd day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

22

GLENN E. BRAS CORPORATION and MARY BRAS, individually,	)	
Plaintiffs,	)	
vs.	)	No. 83-C-481-C
FIRST BANK & TRUST COMPANY OF SAND SPRINGS, Sand Springs, Oklahoma,	)	
Defendant.	)	

J U D G M E N T

This matter came on for consideration of the defendant's motion for summary judgment. The issues having been duly presented and a decision having been duly rendered in accordance with the Order filed simultaneously herein and the December 4, 1986 report and recommendations of the Magistrate as adopted and affirmed by this Court,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered on behalf of defendant and against plaintiff Mary Bras.

IT IS SO ORDERED this 22nd day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GINA MANDERS and VINNIE PAYTON HOOVER,	)	
Plaintiffs,	)	
v.	)	No. 86-C-436-B
	)	No. 86-C-437-B
STATE OF OKLAHOMA EX REL DEPARTMENT OF MENTAL HEALTH AND EASTERN STATE HOSPITAL and LA ROE HANEY,	)	
Defendants.	)	

O R D E R

This matter comes before the Court on defendants' motion to dismiss the amended complaint filed October 2, 1986, pursuant to Fed.R.Civ.P. 12(b)(6). The defendants filed a motion to dismiss the original complaint and then supplemented their motion after the plaintiffs amended their complaint and added a claim for damages under 42 U.S.C. §1983.

Plaintiffs' original complaint sought an award of attorneys' fees pursuant to §706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k). For the reasons set forth below the various defendants' motions are granted in part. In this consolidated case the plaintiffs, Gina Manders and Vinnie Payton Hoover, claim that while employed by the Department of Mental Health and Eastern State Hospital they were subjected to sexual discrimination by the defendant supervisor. The plaintiffs filed a claim with the Oklahoma Human Rights Commission and the EEOC but first went through an informal grievance procedure provided

by the Oklahoma Department of Mental Health. Plaintiffs assert in their complaint that they received their requested relief in the informal grievance procedure but were not awarded attorneys' fees of approximately $6,500.00. The plaintiffs' initial complaint sought to recover the $6500.00 attorneys' fees.

The various defendants have moved to dismiss the attorneys' fees complaint on the grounds that such fees are not recoverable under 42 U.S.C. §2000e-5(k). Defendants assert that the internal grievance proceeding is not a part of the mandatory state and local proceedings which plaintiffs must pursue prior to seeking relief in the federal court. The defendants also point out that the internal grievance plan allows the employee at any time the right to file his or her case with the Oklahoma Human Rights Commission and seek relief under the procedures outlined in Title VII. 42 U.S.C. §2000e-5(k) states in pertinent part:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

The plaintiffs argue in their complaint and responses that the language "action or proceeding" was intended to encompass such as the informal grievance procedure provided by the Department of Mental Health. Plaintiffs cite New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) as authority for attorneys' fee awards in administrative proceedings under Title VII. Defendants counter and claim that the Gaslight case

construed the words "or proceeding" to mean those state and local remedies to which complainants are required to resort prior to filing a lawsuit in the federal court. The Court agrees with the defendants' interpretation and finds that the informal grievance procedure utilized by the plaintiffs in this case was not of the type contemplated by Congress in allowing attorneys' fees under Title VII of the Civil Rights Act. As the plaintiffs have cited no authority for such awards at the pre-grievance stage, the defendants' motion to dismiss the attorneys' fees claim is hereby granted.

Also pending before the Court are the defendants' motions to dismiss the 42 U.S.C. §1983 claims. Plaintiffs admit that the Eleventh Amendment bars a §1983 suit against the Department of Mental Health and Eastern State Hospital and also against defendant Haney in his official capacity. Therefore, the motion to dismiss the §1983 action is granted as to those defendants.

The sole issue remaining is whether or not the defendant Haney in his individual capacity is still potentially liable under 42 U.S.C. §1983.

In order to state a claim under §1983 two allegations are required. First, the plaintiff must alleged that some person has deprived him of a constitutional right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Plaintiffs' allegations in the instant case

reveal that the defendant Haney was acting in a supervisory position in the Department of Mental Health. The complaint further alleges that in that position he denied the plaintiffs' constitutional rights by harassment and denial of job perquisites based upon sexual favors.

The defendant Haney characterizes the alleged actions as merely a tort by an individual and therefore not entitled to be brought under §1983. However, under the standard employed for a motion to dismiss, the defendant must establish that the plaintiff can prove no set of facts in support of her claim that would entitle the plaintiff to relief. Haines v. Kerner, 404 U.S. 519 (1972); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973). All factual allegations should be construed to the pleader. Gardner v. Toilet Goods Assn., 387 U.S. 167 (1967); Lee v. Derryberry, 466 F.Supp. 30 (W.D.Okl. 1978); Halliburton Oil Producing Co. v. Aetna Ins. Co., 491 F.Supp. 595 (W.D.Okl. 1978). Under the articulated standard the plaintiffs' cause of action against the defendant in his individual capacity is adequate. Therefore, the motion to dismiss the §1983 action against the defendant Haney in his individual capacity is hereby denied. Defendant Haney should file his answer by January 5, 1987.

As stated previously, the action against State of Oklahoma ex rel. Department of Mental Health, Eastern State Hospital, and LaRoe Haney (in his official capacity) is hereby dismissed.

The parties should follow the pretrial schedule below:

- Amend or add additional parties by January 12, 1987;
- Exchange the names and addresses of all witnesses, including experts, in writing, along with a brief statement re each witness' expected testimony (not necessary if witness' deposition taken) by March 18, 1987;
- Discovery cutoff - March 30, 1987;
- Final pretrial order and exchange exhibits - April 6, 1987;
- Motions in limine, requested voir dire and requested jury instructions re §1983 claim - April 13, 1987;
- Jury trial is set for April 20, 1987, at 9:30 A.M.

IT IS SO ORDERED this 22nd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

nm

GINA MANDERS and VINNIE PAYTON HOOVER,	)	
Plaintiffs,	)	
v.	)	No. 86-C-436-B ✓
	)	No. 86-C-437-B
STATE OF OKLAHOMA EX REL DEPARTMENT OF MENTAL HEALTH AND EASTERN STATE HOSPITAL and LA ROE HANEY,	)	
Defendants.	)	

O R D E R

This matter comes before the Court on defendants' motion to dismiss the amended complaint filed October 2, 1986, pursuant to Fed.R.Civ.P. 12(b)(6). The defendants filed a motion to dismiss the original complaint and then supplemented their motion after the plaintiffs amended their complaint and added a claim for damages under 42 U.S.C. §1983.

Plaintiffs' original complaint sought an award of attorneys' fees pursuant to §706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k). For the reasons set forth below the various defendants' motions are granted in part. In this consolidated case the plaintiffs, Gina Manders and Vinnie Payton Hoover, claim that while employed by the Department of Mental Health and Eastern State Hospital they were subjected to sexual discrimination by the defendant supervisor. The plaintiffs filed a claim with the Oklahoma Human Rights Commission and the EEOC but first went through an informal grievance procedure provided

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by the Oklahoma Department of Mental Health. Plaintiffs assert in their complaint that they received their requested relief in the informal grievance procedure but were not awarded attorneys' fees of approximately $6,500.00. The plaintiffs' initial complaint sought to recover the $6500.00 attorneys' fees.

The various defendants have moved to dismiss the attorneys' fees complaint on the grounds that such fees are not recoverable under 42 U.S.C. §2000e-5(k). Defendants assert that the internal grievance proceeding is not a part of the mandatory state and local proceedings which plaintiffs must pursue prior to seeking relief in the federal court. The defendants also point out that the internal grievance plan allows the employee at any time the right to file his or her case with the Oklahoma Human Rights Commission and seek relief under the procedures outlined in Title VII. 42 U.S.C. §2000e-5(k) states in pertinent part:

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The plaintiffs argue in their complaint and responses that the language "action or proceeding" was intended to encompass such as the informal grievance procedure provided by the Department of Mental Health. Plaintiffs cite New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) as authority for attorneys' fee awards in administrative proceedings under Title VII. Defendants counter and claim that the Gaslight case

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The sole issue remaining is whether or not the defendant Haney in his individual capacity is still potentially liable under 42 U.S.C. §1983.

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The defendant Haney characterizes the alleged actions as merely a tort by an individual and therefore not entitled to be brought under §1983. However, under the standard employed for a motion to dismiss, the defendant must establish that the plaintiff can prove no set of facts in support of her claim that would entitle the plaintiff to relief. Haines v. Kerner, 404 U.S. 519 (1972); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973). All factual allegations should be construed to the pleader. Gardner v. Toilet Goods Assn., 387 U.S. 167 (1967); Lee v. Derryberry, 466 F.Supp. 30 (W.D.Okl. 1978); Halliburton Oil Producing Co. v. Aetna Ins. Co., 491 F.Supp. 595 (W.D.Okl. 1978). Under the articulated standard the plaintiffs' cause of action against the defendant in his individual capacity is adequate. Therefore, the motion to dismiss the §1983 action against the defendant Haney in his individual capacity is hereby denied. Defendant Haney should file his answer by January 5, 1987.

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UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

nm

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Plaintiffs,	)	
v.	)	No. 86-C-436-B No. 86-C-437-B
STATE OF OKLAHOMA EX REL DEPARTMENT OF MENTAL HEALTH AND EASTERN STATE HOSPITAL and LA ROE HANEY,	)	
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reveal that the defendant Haney was acting in a supervisory position in the Department of Mental Health. The complaint further alleges that in that position he denied the plaintiffs' constitutional rights by harassment and denial of job perquisites based upon sexual favors.

The defendant Haney characterizes the alleged actions as merely a tort by an individual and therefore not entitled to be brought under §1983. However, under the standard employed for a motion to dismiss, the defendant must establish that the plaintiff can prove no set of facts in support of her claim that would entitle the plaintiff to relief. Haines v. Kerner, 404 U.S. 519 (1972); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973). All factual allegations should be construed to the pleader. Gardner v. Toilet Goods Assn., 387 U.S. 167 (1967); Lee v. Derryberry, 466 F.Supp. 30 (W.D.Okl. 1978); Halliburton Oil Producing Co. v. Aetna Ins. Co., 491 F.Supp. 595 (W.D.Okl. 1978). Under the articulated standard the plaintiffs' cause of action against the defendant in his individual capacity is adequate. Therefore, the motion to dismiss the §1983 action against the defendant Haney in his individual capacity is hereby denied. Defendant Haney should file his answer by January 5, 1987.

As stated previously, the action against State of Oklahoma ex rel. Department of Mental Health, Eastern State Hospital, and LaRoe Haney (in his official capacity) is hereby dismissed.

The parties should follow the pretrial schedule below:

- Amend or add additional parties by January 12, 1987;
- Exchange the names and addresses of all witnesses, including experts, in writing, along with a brief statement re each witness' expected testimony (not necessary if witness' deposition taken) by March 18, 1987;
- Discovery cutoff - March 30, 1987;
- Final pretrial order and exchange exhibits - April 6, 1987;
- Motions in limine, requested voir dire and requested jury instructions re §1983 claim - April 13, 1987;
- Jury trial is set for April 20, 1987, at 9:30 A.m.

IT IS SO ORDERED this 22nd day of December, 1986.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

entered

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 22 1986

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

TRUCK INSURANCE EXCHANGE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 86-C-122-C
	)	
TED FRY,	)	
	)	
Defendant.	)	

O R D E R

Now before the Court for its consideration is the motion of the plaintiff Truck Insurance Exchange for summary judgment against the defendant Ted Fry, and the cross motion of the defendant for summary judgment against plaintiff. The motions are brought pursuant to Rule 56 F.R.Cv.P.

This action arises out of case no. CJ-84-5882 filed in the District Court of Tulsa County on October 29, 1984. In the state court action, defendant herein, Ted Fry, was named as a co-defendant. The petition sets forth a cause of action in negligence against each defendant for the alleged failure of defendant to install a protective fence on property Fry rented to plaintiffs, the Lohrenz's. Subsequently on February 22, 1985 plaintiffs filed an amended petition striking the tort action against Fry and adding, in its place, a cause of action for breach of contract.

Plaintiff herein issued to defendant Fry a farm and ranch insurance policy No. S25835507 on July 31, 1981. This insurance policy contained a contract exclusion clause, which includes the following language:

> (g) ... to any obligation for which the insured may be held liable in an action on a contract or agreement by a person not a party thereto;
> (i) ... to liability assumed by the insured under any contract or agreement ...

Plaintiff alleges its policy does not provide coverage for its insured to any liability that may arise out of the state court, in that coverage does not exist pursuant to the terms of the policy.

The construction and effect of insurance contracts are questions of law to be determined by the Court. Farm Bureau Mutual Ins. Co. v. Horinek, 660 P.2d 1374, 1376 (Kans. 1983). When the language of an insurance policy is clear and unambiguous, the words are to be taken and understood in their plain, ordinary and popular sense. There is no need for judicial interpretation or application of the rules of liberal construction, because the court's function is to enforce the policy according to its contractual terms. Western Food Products Co. Inc. v. U.S. Fire Ins. Co., 699 P.2d 579 (Kans. 1985). The Court finds from the clear and unambiguous language of the insurance policy that coverage is not provided for liability arising out of an agreement or contract. Further, the Court finds that the Lohrenz's, plaintiff in the state court action, limited their claim against Fry to damages for breach of contract; and any

liability Fry may therefore face would flow from the breach of that agreement, as plead.

WHEREFORE, premises considered, it is the Order of the Court that the motion for summary judgment brought by the plaintiff, Truck Insurance Exchange, against the defendant, Ted Fry, is hereby granted.

IT IS THE FURTHER ORDER OF THE COURT that the motion for summary judgment brought by the defendant, Ted Fry, against the plaintiff, Truck Insurance Exchange, is hereby denied.

IT IS SO ORDERED this 22nd day of December, 1986.

H. DALE COOK
Chief Judge, U. S. District Court